

**COMPREHENSIVE  
AGREEMENT**

Between

**Town of Blacksburg,**  
a Virginia municipal corporation

And

**W. M. Jordan Development, LLC,**  
a Virginia limited liability company

The Project (known as the Town of Blacksburg Public Safety Complex) is a two-story ±35,074 SF building for the Blacksburg Police Headquarters and Emergency Operations Center and will also include a six-story parking deck with 300 public parking spaces and 38 parking spaces designated for police parking. The first floor of the building will consist of a lobby, community room, records, Fusion Center, Booking, Evidence and Patrol. The second floor of the building will contain Administration, Emergency Operations Center, Investigations, Training, lockers, break area and outdoor break area.

(Project Description)

As of 9/1, 2020

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## **EXHIBITS**

- A – Legal Description/Plat (x pages)
- B – Scope of Work (x pages)
- C – Draw Schedule (x pages)
- D – Schedule Milestones (x pages)
- E – Items and Prices Summary (x pages)
- F – Document Log to include Value Engineering Log (x pages)

**THIS COMPREHENSIVE AGREEMENT** ("Agreement") is entered into effective as of this \_\_\_ day of \_\_\_\_\_ 2020 (the "Effective Date"), by and between **Town of Blacksburg**, a Virginia municipal corporation ("**Owner**"), and W. M. Jordan Development, LLC, a Virginia limited liability company, ("**Developer**") of 11010 Jefferson Avenue, Newport News, Virginia 23601.

**Recitals:**

R-1. On May 8, 2012, the Owner adopted procedures to implement the Virginia Public-Private Education Facilities and Infrastructure Act of 2002 ("PPEA"), Va. Code 56-575.1, et seq.

R-2. On April 14, 2018, the Owner subsequently received an unsolicited proposal for the Project pursuant to the PPEA.

R-3. The Owner accepted the unsolicited proposal for consideration and requested competing proposals. The Owner determined in writing that proceeding with the procurement that was the subject of the proposal using competitive negotiation procedures was likely to be advantageous to the Owner and the public based upon probable scope, complexity, or urgency of the Project, risk sharing and added value, and economic benefit from the Project that would not otherwise be available.

R-4. The Owner received two conceptual-phase proposals in addition to the unsolicited proposals, and it subsequently invited two proposers to submit detailed-phase proposals, which the proposers did. Developer was one of those proposers. The Town entered into an Interim Agreement with Developer on May 15, 2019, and a Second Interim Agreement on November 8, 2019.

R-5. The Owner subsequently conducted negotiations with Developer, arriving at the terms and conditions of proposed comprehensive agreements. Based upon the proposers' proposals, presentations and the negotiations, the Owner determined that the Project is a qualifying project that serves the public purpose of the PPEA under the criteria of Va. Code § 56-575.4C and would be in the public interest to pursue.

R-6. The Owner has selected Developer for entry into a comprehensive agreement for the Project, informed the Developer by letter, dated \_\_\_\_\_ that the Owner intended to proceed with the Developer's proposal and the Owner and Developer now wish to enter into this Agreement for the Project.

**NOW, THEREFORE**, for and in consideration of the premises and mutual covenants hereinafter contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed, and subject to the conditions herein set forth, the parties hereby covenant, agree, and bind themselves as follows:

**ARTICLE I**  
**DEFINITIONS**

The following definitions apply to this Agreement:

- 1.1. **Architect - Engineer ("A-E")** means Developer's design professional Person responsible for the architectural and engineering services for the Project, including, without limitation, its design. Developer has proposed, and Owner has agreed, that AECOM shall be its A-E for the Project, and Developer shall use AECOM for the Project unless the Owner approves otherwise in writing.
- 1.2. **Change** means any addition to, deletion from, or modification of the Project or the Services that is made in accordance with the provisions of this Agreement. A Change may be made by a written Change Order if Owner and Developer agree as to adjustments to the CCL or GMP, as applicable, and schedule, or unilaterally by the Owner by a written Change Directive, with any adjustments to the CCL or GMP (hereinafter defined), as applicable, and schedule, to be determined subsequently pursuant to Article XVII of this Agreement.
- 1.3. **Change Directive** means a written order by the Owner, specifically identified as a Change Directive, directing a Change.
- 1.4. **Change Order** means a Change made by a written agreement in which the Owner and Developer have indicated agreement as to the Change and adjustments to price and schedule due to the Change and have evidenced their agreement by executing the written agreement.
- 1.5. **Codes and Standards** means all local, state and federal regulations, ordinances, codes, laws, or requirements applicable to the Project, including, without limitation, the Virginia Uniform Statewide Building Code.
- 1.6. **Contract Cost Limit ("CCL")** means the initial limit established at the time of execution of this Agreement on total amounts payable to the Developer under this Agreement absent a Change pursuant to this Agreement.
- 1.7. **Contract Documents** means the following listed in their order of precedence:
  - (a) Any written modifications to this Agreement made in accordance with this Agreement;
  - (b) This Comprehensive Agreement, including all exhibits thereto;
  - (c) Any written Change Orders made in accordance with this Agreement;
  - (d) Any written Change Directives issued in accordance with this Agreement;
  - (e) The Construction Documents, which are the final Plans and Specifications that are approved by the Owner, Architect, and Developer;
  - (f) Plans and Specifications that are approved by the Owner, A-E, and Developer.
  - (g) Documents incorporated by reference in this Agreement;
  - (h) Developer's Detailed-Phase Proposal; and
  - (i) Developer's Conceptual-Phase Proposal.
- 1.8. **Contractor or Prime Construction Contractor** means W. M. Jordan Company, Incorporated, a Virginia corporation, and Developer shall use this Contractor for the Project unless the Owner approves otherwise in writing.
- 1.9. **Day** means a calendar day, and "days" mean calendar days, unless the contrary is expressly indicated.
- 1.10. **Developer** means W. M. Jordan Development, LLC, a Virginia limited liability company.
- 1.11. **Draw Schedule** means the schedule attached hereto as Exhibit C to be used as a basis for payment

of the Fixed Fees component of payments to Developer, setting forth the anticipated completion date of the various components of the Project and the value assigned to those different components.

- 1.12 **Excusable Delays** means the delays specified in Section 10.5.
- 1.13. **Fixed Fees** mean the amounts payable to the Developer as specified in Section 5.4 for the Services in addition to Reimbursable Costs.
- 1.14 **Final Completion of Work, Final Completion or final completion** means completion in conformance with this Agreement, the Construction Documents, and other Contract Documents of all of the work required by this Agreement, including without limitation, punch list items, but not including warranty items.
- 1.15. **Guaranteed Maximum Price ("GMP")** means the amount less than the CCL established following design as the maximum amount payable to the Developer absent a Change.
- 1.16. **Land** means the real property described in Exhibit A hereto on which the Project will be constructed.
- 1.17. **Owner** means Town of Blacksburg. The parties understand that the plan of finance for the Project may call for use of lease revenue bonds, with the Land to be leased through a ground lease to finance construction of the Project and with the lease of completed facilities back to the Owner. Despite the plan of finance, the Owner shall nonetheless be considered the Owner for purposes of this Agreement because it will be the ultimate user of the facilities and because the parties contemplate that the lessor of any ground lease will delegate or assign its duties during construction as nominal owner of the new facilities to the Owner.
- 1.18. **Owner's Representative** means that individual designated by the Owner in writing to perform the functions of Owner's Representative specified in this Agreement.
- 1.20. **Person** means any individual, partnership, joint venture, association, joint-stock company, corporation, limited liability company, trust, unincorporated organization, government or any agency or political subdivision thereof.
- 1.21. **Plans and Specifications** mean the surveys, plans and specifications that Developer causes to be prepared for the Project that are approved by the Owner, A-E, and Developer.
- 1.22. **Project** means a two-story  $\pm$  34,0725 SF Police Safety Complex Building that includes a six-story parking deck with 302 public parking spaces and 25 parking spaces designated for police parking to be designed and constructed by Developer on the Land in accordance with the Construction Documents and the terms of this Agreement, and any related upgrades ordered by Change or Change Order.
- 1.23. **Project Schedule** means the schedule for construction of the Project, which, in its initial version, is set forth in Exhibit D attached hereto.
- 1.24. **Punch List Items** means a list of minor items of work to be completed and deficiencies to be corrected, identified by the Owner's Representative or A-E, that do not affect the attainment of Substantial Completion. If the Owner's Representative and A-E do not agree as to an item or items, any such items not agreed upon shall be considered a punch list item until a contrary determination is made pursuant to Article XVII of this Agreement. Such items must be complete before Final Completion can take place.
- 1.25. **Reimbursable Costs** mean the amounts payable to the Developer as specified in Section 5.3 for the Services in addition to the Fixed Fees.
- 1.26. **Intentionally Deleted.**
- 1.27. **Scope of Work** means all the work for the Project to be provided by Developer within the CCL and GMP, except as modified by any Change.
- 1.28. **Services** means all pre-construction and development services and all architectural and engineering

design, procurement and construction services related to the Project furnished by Developer, including, without limitation, all labor, services, materials and facilities, and all other things that are required to provide for the development of the site and the design, construction and equipping of the Project.

- 1.27. **Substantial Completion** means the date determined by inspection by the Owner's Representative and A-E that construction of the Project is so sufficiently complete in accordance with the Construction Documents (subject to punch list items), which Substantial Completion shall be evidenced by issuance of a temporary occupancy permit, that it may be utilized for its intended use, including that the Project is ready to accept move-in by the Owner and all life/safety items are operational.

## **ARTICLE II**

### **GENERAL DESCRIPTION, TERM OF AGREEMENT, AND DEVELOPER'S STATUS AS INDEPENDENT CONTRACTOR**

#### **2.1. General Description.**

Under this Agreement, Developer will be providing to the Owner site design and development services, design services, and construction services for a two-story ±35,074 SF building for the Blacksburg Police Headquarters and Emergency Operations Center and will also include a six-story parking deck with 300 public parking spaces and 38 parking spaces designated for police parking. The first floor of the building will consist of a lobby, community room, records, Fusion Center, Booking, Evidence and Patrol. The second floor of the building will contain Administration, Emergency Operations Center, Investigations, Training, lockers, break area and outdoor break area. (the "Project"). Developer will be providing these services as a design-builder. Developer generally will be compensated its Reimbursable Costs plus Fixed Fees subject to the terms of this Agreement but will be responsible for ensuring that the total cost of the Project to Owner does not exceed the Contract Cost Limit ("CCL") established by this Agreement. Pursuant to this Agreement, Developer will develop a design in order to arrive at a Guaranteed Maximum Price (GMP) for the Project that will not exceed the CCL except to the extent adjusted pursuant to this Agreement. Developer will be responsible for completing the Project so that payments by Owner will not exceed the GMP, as adjusted by this Agreement, even if the costs to Developer to do so exceed the GMP. Savings below the GMP will be divided between the Owner and Developer in accordance with the terms of this Agreement. Because this is a design-build project, Owner makes no warranty to Developer, express or implied, regarding any design for the Project, design requirements, design criteria or the substance or contents of the design documents. The Developer's actions in reviewing and making recommendations to the Owner regarding design are to be advisory only to the Owner. Notwithstanding the foregoing, Developer and its A-E warrant that all design and design services meet the industry standard of care in Virginia for the applicable design professional providing such design or services.

#### **2.2. Term of Agreement.**

This Agreement begins on the Effective Date indicated at the beginning of the Agreement, which is the date of approval of this Agreement by the Town of Blacksburg, and continues until its termination pursuant to Article XVIII or until all obligations under this Agreement have been performed.

#### **2.3. Independent Contractor.**

For all purposes hereunder, Developer is an independent contractor and shall not be deemed an agent, employee or partner of the Owner.

#### **2.4. Subcontractors.**

Developer may subcontract any portion of the Services to be performed hereunder, but Developer shall not thereby be relieved of any of its obligations set forth herein. Developer intends to, and Owner agrees that, Developer will enter into a contract with the Prime Construction Contractor to subcontract the construction work ("Contractor" or "Prime Construction Contractor"). Developer shall use the Prime Construction Contractor unless the Owner, in its reasonable discretion after consultation with Developer, approves otherwise in writing.

### **ARTICLE III** **THE WORK**

#### **3.1. Work/Specifications.**

The Developer shall cause to be designed and constructed in a workmanlike manner and within the Project Schedule the Project as described in Section 2.1 above and as more fully described in Exhibit B hereto. Developer agrees to perform such work, subject to issuance of a Change Directive or a Change Order for such work. Developer agrees to promptly meet and confer with the Owner regarding added scope of work proposed by Owner.

#### **3.2. Conditions Affecting The Work.**

- a. The Developer is responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions that can affect the work or its costs, including, but not limited to available parking and staging areas and existing building materials and components. Any failure by the Developer to reasonably ascertain the conditions affecting the work does not relieve the Developer from responsibility for successfully performing, or causing to be performed, the work without additional expense to the Owner. The Owner assumes no responsibility for any representations concerning conditions made by any of its officers, employees or agents before execution of this Agreement unless such representations are expressly stated in the Agreement.
- b. Owner has furnished (or otherwise made available via posting to Owner's public website) Developer copies of the following reports about which Owner makes no representation or warranty regarding their accuracy:
  - 1) Thompson and Litton Preliminary Architectural Feasibility Report, dated June 26, 2014 and
  - 2) Branch Concord, LLC Unsolicited Proposal and Supplemental Information, dated August 1, 2018.

#### **3.3. Interpretation of Contract Documents.**

- a. The Contract Documents are intended to be complementary and to be interpreted in harmony to avoid conflict if this can reasonably be accomplished.
- b. The following rules regarding correlation and intent of the Contract Documents are first to be employed in the event of any inconsistency, conflict, or ambiguity: (1) Anything mentioned in the Specifications and not shown on the Plans, or shown on the Plans and not mentioned in the Specifications, is of like effect as if shown or mentioned in both; (2) In case of conflicts between Plans and Specifications, the Specifications will govern; (3) In case of a difference between small and large-scale drawings, the large-scale drawings will govern; (4) Schedules on any contract drawing take precedence over conflicting information on that or any other contract drawing; (5) On any of the drawings in which a portion of the work is detailed or drawn out and the remainder is shown in

outline, the parts detailed or drawn out will apply also to all other like portions of the work.

- c. If, despite application of the rules in 3.3b, an inconsistency, conflict, or ambiguity still exists between or among the Contract Documents that cannot be reasonably harmonized, then precedence shall be given to the Contract Documents in the order in which they are enumerated in Paragraph 1.7. of this Agreement.

## **ARTICLE IV**

### **PROJECT DEVELOPMENT**

#### **4.1 Design and Construction.**

The Developer shall be responsible for the coordination of all designs, drawings, plans, specifications, and other services furnished by the Developer under this Agreement.

#### **4.2. Drawings and Specifications.**

Based upon the Scope of Work and/or requirements furnished by the Owner in writing and included herein, the Developer shall prepare the complete contract working plans and specifications. All design submissions for this Project shall be made in both PDF and Revit electronic file form. The minimum scale for building drawings shall be 1/8 inch = 1 foot except for small scale drawings of the floor plan of the entire building with space tabulation. Design submissions shall be made as outlined below. The Owner review and/or approval period shall be in accordance with the Project Schedule Milestones (see Exhibit D), but not less than ten (10) days for each of the following submissions.

**a. Concept Design Development Submission:**

Following a kick-off meeting, the Developer shall prepare a Concept Design Development Submission. Developer shall submit the Concept Design Development Submission to the Owner for review and approval in accordance with the Project Schedule shown in Exhibit D. The Owner review period will be in accordance with the Project Schedule shown in Exhibit D.

**b. Schematic Design Submission:**

Following receipt of Owner's approval of the 10% Concept Design submission, the Developer shall prepare a Schematic Design submission. Developer shall submit the Schematic Design Development submission to the Owner for review and approval in accordance with the Project Schedule shown in Exhibit D. It is understood that the Owner has the option to perform a value engineering study during this period. The Owner review period will be in accordance with the Project Schedule shown in Exhibit D.

**c. Design Development Submission:**

Following receipt of Owner's approval of the Schematic Design submission, the Developer shall prepare a Design Development submission. Developer shall submit the Design Development submission to the Owner for review and approval in accordance with the Project Schedule shown in Exhibit D. The Owner review period will be in accordance with the Project Schedule shown in Exhibit D.

**d. 100% Construction Documents Submission:**

Following receipt of Owner's approval of the Design Development submission, the Developer shall prepare a 100% Construction Documents submission. Developer shall submit the 100% Construction Documents submission to the Owner for review and approval in accordance with the Project Schedule shown in Exhibit D. On an exception basis, intermediate submissions may be provided for the design of foundations, structural steel and other items or systems requiring either advance procurement or construction start prior to the completion of the overall design in accordance with the approved schedule. The Owner review period will be in accordance with the Project Schedule shown in Exhibit D.

#### **4.3. Construction.**

With Owner's prior agreement in writing, construction may be allowed to commence in accordance with the Project Schedule prior to the Owner's Representative's approval of all of the Construction Documents. Where phased/fast track construction is proposed prior to overall final approval, plans and specifications covering the system or components covered by that phase must be approved by the Owner's Representative prior to the start of construction of that phase.

### **ARTICLE V**

#### **PRICES AND SHARED SAVINGS**

##### **5.1. Prices.**

The Developer must provide, or cause to be provided, all work called for under this Agreement, including furnishing all material, services, labor and equipment to perform the Services for the prices as indicated in Exhibit E.

##### **5.2. Contract Cost Limit ("CCL").**

A Contract Cost Limit (CCL) has been agreed to by the parties, the amount of which is stated in Exhibit E. The CCL is the maximum amount payable to Developer and is a cap on Developer's compensation, which is the sum of Reimbursable Costs (see Section 5.3) and Fixed Fees (see Section 5.4) payable to complete the Scope of Work. As the design is refined, a Guaranteed Maximum Price (GMP) will be established, and it may be less than the CCL (but it shall not exceed the CCL) unless Owner directs a Change to the Scope of Work.

##### **5.3. Reimbursable Costs.**

- a. Subject to the limitation that payments to Developer shall not exceed CCL or the GMP, as applicable, Owner will reimburse Developer for all the following costs for the Project:
  1. Prime Construction Contractor materials, supplies, and equipment either incorporated directly into the construction on the Project or required to accomplish a construction activity on the Project including equipment rental, transportation, and storage.
  2. Prime Construction Contractor Labor: Labor costs for personnel performing labor at the Project site. Labor costs include hourly rates with all fringe benefits and taxes required by law and applicable contracts in force between the Contractor and its employees.
  3. Subcontractor costs for work on items directly related to and/or incorporated into the finished construction for the Project. The term "subcontracts" includes purchase orders. Developer shall conduct, or cause to be conducted, the subcontractor bid process on an "open book" basis, and shall allow the Owner's Representative to observe the receipt and analysis of all bids. Developer shall cause the Prime Construction Contractor to invite at least three (3) bidders, if practical, and

endeavor to receive price quotations from at least three (3) firms for all subcontracts for, but not limited to, equipment, equipment rentals, materials, labor contracts, any other supplies or services, where the quotations are expected to exceed or actually exceed \$50,000, unless otherwise authorized by the Owner's Representative. The Owner's Representative may recommend additional subcontractor bidders to Developer. It is not required that the award be made to the lowest offeror, but shall be made on the basis of best value. Developer may select certain subcontractors without going through the bid process as required above if it first obtains Owner's written consent, which may be withheld in Owner's discretion.

4. Other Project-related direct costs that may be reimbursed under this Agreement include, but are not limited to, the following: Contractor direct expenses; legal, insurance and accounting (project related); general conditions, payment and performance bonds, taxes including gross receipts tax, permits, utility availability, relocation and usage costs, "on site construction" supervision, quality control, safety, training, engineering/layout, fire protection, cleanup, field office equipment and operation.
- b. Owner will not reimburse Developer for the following costs:
1. Prime Construction Contractor costs *not* associated with personnel assigned to the Project are considered to be indirect costs that are included as part of the Fixed Fees and are not Reimbursable Costs. Examples of indirect costs that are not Reimbursable Costs include, but are not limited to: bonuses to senior executives, travel by company executives or officers, and personnel whose services and/or responsibilities include multiple projects, e.g., accounting, home office estimating, and purchasing personnel.
  2. Public relations and advertising, bad debts, contributions and donations, dividends or payments of profits, entertainment, fines or penalties, life insurance for officers, partners, or proprietors, interest on loans, lobbying, losses on other contracts, income taxes, proposal preparation costs and legal costs involving disputes with the Owner.

#### **5.4. Fixed Fees.**

The Owner shall pay the Developer Fixed Fees, which consist of the architecture and engineering fees, development fees and expenses, and general contracting fees stated in Exhibit E. The Fixed Fees include all compensation payable by Owner to Developer beyond Reimbursable Costs for the Services and are intended to compensate for the Developer's and Prime Construction Contractor's home office support, overhead costs, and profit for the Project and for all design professional services. The Fixed Fees will not vary with either the estimated cost or actual cost of construction of the Project except as expressly allowed in this Section 5.4. The components of the Fixed Fees in a. through c. below will be increased when a Change in the Project results in a significant increase in the direct costs, such as an increase in engineering man-hours, or increased insurance costs. The Fixed Fees will not be reduced unless the Owner requires an equitable reduction in the Fixed Fees for any Change that reduces the Scope of Work.

- a. Developer's Fees and Expenses: This component of the Fixed Fees includes all labor and material costs and fee to manage the development and construction process including, without limitation, management of the design, construction, and permitting, and to prepare the Guaranteed Maximum Price. This component of the Fixed Fees covers all work in connection with development activities.
- b. Architect-Engineer (A-E) Fees and Expenses for Services for Design, Construction Documents and During Construction: This component of the Fixed Fees covers the design and preparation of Schematic Design, Design Development and Construction Documents. This component of the Fixed Fees also covers construction administration by the A-E and includes, but is not limited to, review of shop drawings and samples, field interpretation of Construction Documents, preparation of required clarification drawings, and participation in quality control activities.
- c. General Contractor Fee during Construction: This component of the Fixed Fees covers profit on

construction plus home office support (including Project Manager, Project Engineer, Estimator, and Purchasing) and overhead costs.

#### **5.5. Guaranteed Maximum Price.**

- a. A Guaranteed Maximum Price (GMP) shall be established by the parties for the Project *at the time of approval of the 100% Construction Development submission* and prior to commencement of construction. The GMP is the maximum sum that the Owner shall pay to the Developer in total for this Project, except as otherwise provided in this Comprehensive Agreement. It includes all the Reimbursable Costs as defined in Section 5.3 that will be payable to Developer and all Fixed Fees as defined in Section 5.4 that will be payable to Developer.
- b. If at any time during construction it becomes apparent that the final Reimbursable Costs and Fixed Fees will exceed the GMP, the Developer shall immediately notify the Owner's Representative and advise him/her of the action it proposes to take to reduce costs.
- c. All proposed revisions or changes to the approved Plans and Specifications must be submitted to the Owner's Representative for review and approval for conformance with the approved design development plans and specifications, regardless of whether or not they affect the GMP. Provided the changes do not affect the GMP, Owner's review and approval shall be not be unreasonably conditioned, delayed or withheld.
- d. Developer shall ensure that the GMP is less than the CCL.
- e. No payment shall be made to Developer in excess of the GMP except as adjusted for any Changes made in accordance with this Agreement. The Developer shall be wholly responsible to complete the Project at no compensation above the GMP as adjusted for any Changes made in accordance with this Agreement.

#### **5.6. Change In Fixed Fees Component Relating To Services For Modification of Design.**

For Changes, the Developer shall, upon the written request of the Owner's Representative, make the necessary design drawing and specification revisions; prepare and issue requests for proposal describing the modifications; prepare estimates, drawings and specifications as required; evaluate proposals and make recommendations to the Owner's Representative. The amounts payable by Owner for services under this paragraph will be negotiated, and if the amount payable cannot be agreed upon, will be based upon the rates indicated in Exhibit E hereto and a determination of a reasonable amount of time to complete such services.

#### **5.7. Share in Savings.**

If the final Project Reimbursable Costs plus Fixed Fees, as presented by Developer within sixty (60) days after Final Completion and then reviewed and audited by the Owner within forty-five (45) days of receipt, are less than the GMP, as adjusted for any changes made in accordance with this Agreement, then savings represented by the difference shall be shared on the following basis: 25% to the Developer and 75% to the Owner.

### **ARTICLE VI** **SAMPLES**

#### **6.1. Sample Approval.**

After issuance of the notice to proceed with construction, the Developer shall furnish, or cause to be

furnished, to the Owner's Representative samples required by the specifications or by the Owner's Representative, for the Owner Representative's approval. The Owner's review and approval shall not be unreasonably withheld, conditioned, or delayed and shall be made in a time frame so as not to delay the Developer or Contractor. Samples shall be delivered to the Owner's Representative as specified or as directed. The Developer shall prepay all shipping charges on samples. Materials or equipment for which samples are required may not be used in the work until the Owner's Representative approves them in writing. Approval of a sample is only for the characteristics or use named in the approval and may not be construed to change or modify any requirement of the Contract Documents. Substitutions are not permitted unless approved in writing by the Owner's Representative.

#### **6.2. Labels.**

Each sample must be labeled to show:

- a. Name of Project building or facility, Project title, and contract number;
- b. Name of Developer and (if appropriate) Prime Construction Contractor and subcontractor;
- c. Identification of material or equipment, with specification requirement;
- d. Place of origin; and
- e. Name of producer and brand (if any).

#### **6.3. Markings.**

Samples of finish materials must have additional markings that will identify them under the finish schedules.

#### **6.4. Cover Letter.**

The Developer shall mail under separate cover a letter, in triplicate, submitting each shipment of samples and containing the information required in Sections 6.2 and 6.3 above.

#### **6.5. Use of Samples.**

Approved samples not destroyed in testing will be sent to the Owner's Representative at the Project. Approved samples of hardware in good condition will be marked for identification and may be used in the work. Materials and equipment incorporated in the work must match the approved samples. Samples not destroyed in testing and not approved will be returned at the Developer's expense if the Developer so requests in writing at the time of submission.

#### **6.6. Failure.**

Failure of any material to pass the specified tests will be sufficient cause for refusal to consider, under this Agreement, any further samples of the same brand or make of that material. The Owner reserves the right to disapprove any material or equipment that has previously proved unsatisfactory as determined in Owner's sole discretion in service.

#### **6.7. Testing.**

Samples of materials or equipment delivered on the site or in place may be taken by the Owner's Representative for testing. Failure of a sample to meet the requirements of the Contract Documents may void previous approvals of the item tested. The Developer shall replace materials or equipment found not

to have met requirements of the Contract Documents, unless Owner, in its sole discretion, elects to accept an equitable downward adjustment to the GMP in lieu of such replacement.

#### **6.8 Cost of Testing.**

The Developer shall pay for all costs of construction testing, including sampling, field tests, laboratory tests, inspection services to verify soil classifications, moisture density of soils, observation of subgrades to receive compacted structural fill for building and pavement support, observation of pavement subgrades to receive compacted base course material, observation of fill placement and field density testing, observation of footing subgrades to evaluate suitable bearing, observation of concrete pours, field concrete slump testing, air content testing, molding of concrete cylinders, laboratory curing and compression testing of concrete, observation of steel installation, ultra-sonic testing of steel moment connections, steel weld testing. The Developer shall provide written reports of observations, recommendations, and testing activities as the project progresses. Written report will be made on a biweekly basis to the Owner. The Developer shall include all applicable tests required by ASTM in the specifications. The specifications will also include all tests and inspections required by Codes and Standards.

The Owner will pay for the costs of any other tests deemed necessary, and related engineering services, unless the tests indicate that the workmanship or materials used by the Developer are not in conformance with the Construction Documents, approved shop drawings, or the approved materials. In this event, the Developer shall pay for the tests, remove all work and material failing to conform, and replace with work and materials in full conformity, without additional cost to the Owner.

#### **6.9 Inventory of Samples.**

The Developer shall maintain an inventory of all approved samples until final inspection of the Project. Such samples shall be available to Owner for additional viewing, inspection and testing, as deemed necessary by Owner, at all times.

### **ARTICLE VII**

#### **MEASUREMENTS, DRAWINGS, SPECIFICATIONS**

##### **7.1. Requirement for Verification of Measurements/On Site Documents.**

- a. The Developer, or the Prime Construction Contractor, shall keep at the site electronic copies of all drawings and specifications related to the Contract Documents and shall at all time give the Owner's Representative and designated representative access to them.
- b. When the word "similar" appears on the drawings, it has a general meaning and must not be interpreted as meaning identical, and all details must be worked out in relation to their location and connection with other parts of the work.
- c. In case of discrepancy either in figures, drawings, or specifications, the matter must be promptly submitted to A-E, who shall provide a determination in writing, for approval by the Owner's Representative in writing. Any adjustment by the Developer without such approval will be at the Developer's own risk and expense. The Developer shall furnish from time to time such detailed drawings and other information as may be deemed reasonably necessary by Owner's Representative.

##### **7.2. Drawings and Specifications requirements.**

The following requirements apply to Developer's responsibility to cause the Plans and Specifications to be prepared:

- a. Required technical specifications shall be prepared in accordance with industry standards.

Specifications must be complete, concise, and free of repetition and ambiguity. Care must be exercised to avoid specifying the same work in more than one section and to avoid duplication or conflict with the general provisions, special provisions, and the drawings.

- b. The specifications shall be submitted on 8-1/2"x11" sheets.
- c. Typical specifications developed and used by the A-E in general practice consistent with industry standards shall be used in preparing contract specifications. The CSI Format for Construction Specifications shall be used in the arrangement of Project specifications.
- d. Testing to establish compliance with the Contract Documents for critical items or critical portions of the work shall be specified as the Developer's responsibility. Testing shall be consistent with that required under standard commercial practices. Any testing requirements specified do not limit the Owner from having additional testing and inspection performed in Owner's discretion.
- e. Submittals such as shop drawings, samples, and certificates shall be specified as necessary to establish compliance with the Contract Documents for critical portions of the work. The Developer should not require submittals for minor commercial items or for items of marginal value. The Developer shall include in the mechanical and electrical sections the extent of a manufacturer's literature, rating data, performance curves, spare part lists, and shop drawings that must be furnished for review and approval before procurement.
- f. The specifications shall require the Developer to make field tests of heating and air conditioning systems to demonstrate that the equipment will perform as required. The results of the tests are to be submitted before the final inspection. Manufacturer's representatives may be required for inspection, start-up, and instructions in the operation and maintenance of equipment and the Developer shall ensure their presence for such purposes if requested by the Owner.
- g. All final drawings shall be detailed working drawings as necessary for efficient execution of the construction work. They must conform with the above general requirements and the requirements previously stated. All original drawings must be prepared at an adequate scale to properly present the design data development including detailed features.
- h. The electrical design must be separated into two plans, when necessary to avoid congestion: one devoted to the power, receptacle, telephone, fire alarm and intercommunication systems, and the other to lighting. Similarly, the plumbing and heating/air conditioning must be separated, when necessary to avoid congestion. A minimum scale of 1/4-inch = 1'-0" must be used for all details of areas of congestion such as mechanical rooms, toilet rooms, and the like, and as may otherwise be reasonably designated by the Owner's Representative. Drawing scale for site, utility, or other related work (work outside five foot building line), including details (engineer's) must clearly and adequately reflect the design data developed. Drawings must be organized and provide appropriate details of the site work (layout, grading, paving, and drainage) and the utilities (water, sewer, gas, power, and communications) separate from the building and/or structure drawings.
- i. All design submissions prepared using Revit support shall be accompanied by electronic files of the submission in PDF format.
- j. Any discrepancies in figures, drawings, specifications, or submittals shall be promptly resolved by the Developer. Copies of all Requests For Information (RFI) or other correspondence, including confirmations of verbal instructions between the A-E and the Prime Construction Contractor or the Developer required to resolve deficiencies, shall be furnished to the Owner's Representative.

### **7.3. Shop Drawings, Coordination Drawings, and Schedules.**

- a. The Developer shall submit, or cause to be submitted, to the Owner's Representative a schedule listing all items that will be furnished for review and approval no later than thirty (30) days after final approval of Plans and Specifications. For example, the schedule must include shop drawings and

manufacturer's literature, test procedures, test results, certificates of compliance, material samples, and special guarantees, etc. The schedule must indicate the type of item, contract requirement reference, the Developer's scheduled date for submitting the above items, identification of the first scheduled activity and projected needs for approval answers to support procurement or installation. In preparing the schedule, reasonable time will be allowed for review, approval, and possible re-submittal. Also, the scheduling shall be coordinated with the approved construction progress chart. The Developer must revise and/or update the schedule monthly. Such revised schedule must be made available to the Owner's Representative for monitoring.

- b. The Developer shall submit, or cause to be submitted, to the Owner's Representative shop drawings, coordination drawings, and schedules for approval as required by the specifications or requested by the Owner's Representative, as follows:
  - 1. Shop drawings shall include fabrication, erection, and setting drawings, schedule drawings, manufacturer's scale drawings, wiring and control diagrams, cuts or entire catalogs, pamphlets, descriptive literature, and performance and test data.
  - 2. Drawings and schedules, other than catalogs, pamphlets and similar printed material, shall be reviewed, signed and submitted electronically.
- c. The Developer must check, or cause to be checked, the drawings and schedules and coordinate them (by means of coordination drawings whenever required) with the work of all trades involved before submission, indicating approval on them. Drawings and schedules submitted without evidence of subcontractors/trades' approval may be returned for resubmission.
- d. Each shop drawing or coordination drawing must have a blank area 5 x 5 inches, located adjacent to the title block. The title block must display:
  - 1. Number and title of drawing;
  - 2. Date of drawing or revision;
  - 3. Name of Project building or facility;
  - 4. Name of Developer and, if appropriate, of Subcontractor submitting drawing;
  - 5. Clear identity of contents and location on the work; and
  - 6. Project title and contract number.
- e. Intentionally Deleted.
- f. Except as otherwise provided in subparagraph h. below, approval of drawings and schedules will be general and may not be construed as:
  - 1. Permitting any departure from the requirements of the Contract Documents; or
  - 2. Relieving the Developer of responsibility for any errors, including details, dimensions, and materials.
- g. If drawings or schedules show variations from the requirements of the Contract Documents because of standard shop practice or for other reasons, the Developer must describe the variation in the letter of transmittal. If acceptable, the Owner's Representative may approve any or all variations and issue an appropriate Change Order. If the Developer fails to describe these variations, it is not relieved of the responsibility for executing the work in accordance with the Contract Documents, even though the drawings or schedules have been approved.
- h. Shop drawings, samples, color schedules, catalog cuts, construction schedule, coordination drawings, etc. submitted to Owner's Representative must first be reviewed by the A-E to verify compliance with the Construction Documents. The Owner's Representative reserves the right to review building shop drawings, and formwork and falsework drawings. Such submittals shall be only in response to a specific request by the Owner's Representative.

- i. The Developer shall prepare and submit equipment room layout drawings and drawings of areas where the equipment proposed for use could present interface or space difficulties. Room layout drawings must conform to the requirements established for drawings. Layouts must be submitted within forty (40) calendar days of completion of final construction drawings. Submittals describing the various mechanical and electrical equipment items which are to be installed in the areas represented by the layout drawings must be assembled and submitted concurrently and accompanied by the room layout drawings. Room layout drawings must show all pertinent structural and fenestration features and other items such as cabinets required for installation and which will affect the available space. All mechanical and electrical equipment and accessories must be shown in scale in plan and also in elevation and/or section in their installed locations. Duct work and piping also must be shown.
- j. At the completion of the Project, updated ductwork drawings and sprinkler drawings must be submitted as part of the "As-Built" drawings submission.
- k. All certificates required for demonstrating proof of compliance of materials with specification requirements, including mill certificates, statements of application, and extended warranties, must be executed in quadruplicate and furnished to the Owner's Representative. It is the Developer's responsibility to review all certificates to ensure compliance with the requirements of the Contract Documents and that all affidavits are properly executed prior to submission to the Owner's Representative. Each certificate must be signed by an official authorized to certify on behalf of the manufacturing company. Each certificate must contain the name and address of the manufacturer, the Project name and location, and the quantity and date(s) of shipment or delivery to which the certificate(s) apply. Copies of laboratory test reports submitted with certificates must contain the name and address of the testing laboratory and the date(s) of the tests to which the report applies. Certification shall not be construed as relieving the Developer from furnishing satisfactory material, if, after test(s) are performed on selected sample(s), the material is found not to meet the specified requirements.
- l. The A-E shall review and approve shop drawings and other items. All approvals must be in accordance with the terms of the Contract Documents.
  1. As a result of the A-E's review, each submittal will be marked by the A-E as follows:

"A-Action": The fabrication, manufacture and/or construction may proceed providing the work is in compliance with the Contract Documents.

"B-Action": The fabrication, manufacture and/or construction may proceed providing the work is in compliance with the A-E's notations and the Contract Documents.

"C-Action": No work shall be fabricated, manufactured or constructed and a new submittal is required. No submittal marked "C-Action" shall be permitted on site.

    - (a) The Developer is responsible for obtaining prints of all "A-Action" and "B-Action" reproducible shop drawings and distributing them to the field and to the subcontractors. Concurrently, two (2) copies of each print shall be provided to the Owner.
    - (b) The Developer is responsible for obtaining copies of all "A-Action" and "B-Action" manufacturer's descriptive literature, literature, catalog cuts and brochures and distributing them to the Prime Construction Contractor. Concurrently, two (2) copies of each shall be provided to the Owner.
    - (c) The Developer is responsible for submitting new shop drawings, brochures and/or samples to replace all "C-Action" items and furnishing two (2) copies to the Owner.
  3. The Developer is responsible for maintaining the Shop Drawing Log. An updated copy of the Log shall be furnished to the Owner no less than monthly.

#### **7.4. Record "As Built" Drawings.**

- a. The Developer shall, during the progress of the work, keep, or cause to have kept, a master set of electronic prints on the job site on which is kept a complete, careful and neat record of all deviations from the Construction Documents made during the course of the work.
- b. The Developer shall provide the Owner with one, complete, reproducible set of the Construction Documents incorporating the revisions and changes made during construction up to acceptance of the facility. These updated plans and specifications shall reflect all changes to the Construction Documents to indicate the "As-Built" conditions, including revisions in site and building area tabulations. These drawings and specifications must be certified as to their correctness by the signature of the Developer and used in preparing a permanent set of "As-Built" drawings.
- c. In addition to reproducible submissions, the Developer must submit a Revit system electronic file for these "As Built" documents prepared with a Revit system compatible with the Owner's Revit system identified by the Owner's Representative.
- d. The Owner reserves the right to review "As-Built" documents at any time during the Project.
- e. The Developer shall forward all "As-Built" drawings, specifications and photographs to the Owner's Representative not later than thirty (30) calendar days after Project completion.
- f. Costs associated with the preparation and completion of the "As-Built" drawings will not be paid to Developer by Owner until the As-Built drawings are approved by the Owner's Representative.

### **ARTICLE VIII**

#### **Warranty**

##### **8.1. Warranties.**

The Developer warrants that all the work furnished as part of the Services is in accordance with the requirements of the Contract Documents, free from defect or inferior materials or equipment, and of such quality workmanship as to meet the industry standard of care in Virginia for the type of work performed, for a period of one year after the date of Substantial Completion or acceptance of the facility (whichever comes first), and, unless otherwise agreed by the Owner in writing, in Owner's sole discretion, all materials and equipment are new. During the period between completion of the work and Developer's receipt of the final payment from Owner, Developer shall deliver to Owner all warranties (extended and otherwise) together with all operations and maintenance manuals, which include warranties, guarantees and certifications. All warranties provided or assigned by Developer shall be cumulative, so as to maximize Owner's warranty protection.

##### **8.2. Repairs.**

If, within the warranty period, the Owner's Representative finds that warranted work needs to be repaired or changed because the materials, equipment, or workmanship were inferior, defective, or not in accordance with the requirements of the Contract Documents at the time of Final Completion, the Developer shall promptly, and without additional expense to the Owner:

- a. Place in a condition consistent with the warranties and satisfactory to the Owner all of the warranted work;
- b. Correct all damage to equipment, the site, the building, or its contents that is the result of such unsatisfactory work in a manner satisfactory to the Owner; and
- c. Correct any work, materials, or equipment disturbed in fulfilling the warranty in a manner satisfactory to the Owner; and
- d. Should the Developer fail to commence action within ten (10) days in accordance with the warranty,

the Owner may have the work performed by others at the Developer's expense.

### **8.3 Transfer of Warranties.**

The Developer shall obtain each transferable guarantee or warranty of equipment, materials, or installation that is furnished by any manufacturer or installer in the ordinary course of the business or trade. The Developer shall obtain and furnish to the Owner all information required to make any such guarantee or warranty legally binding and effective, and shall submit both the information and the guarantee or warranty to the Owner in sufficient time to permit the Owner to meet any time limit requirements specified in the guarantee or warranty or, if no time limit is specified, before completion and acceptance of all work under this Agreement.

### **8.4 Non-Waiver.**

Owner, by accepting any warranties or guarantees under this Agreement, does not waive any legal right or remedy that Owner otherwise may have for breach of this Agreement.

## **ARTICLE IX** **INSURANCE, BONDS AND RISK**

### **9.1 Bonds.**

Developer shall provide payment and performance bonds for 100% of the construction value of the Project which is \$20,926,608.00. The bonds shall be provided when and to the extent the Developer has been given a notice to proceed with construction at the site. The bonds shall make the Owner obligee and shall be in a form acceptable to Owner. The sureties providing the bonds shall be rated A+ or AVIII or higher, approved by the Owner's Representative in writing, and authorized to do business in the Commonwealth of Virginia.

### **9.2 Insurance.**

- a. During the term of this Agreement, the Developer must maintain as a Reimbursable Expense the insurance required by this Section 9.2. Insurance companies providing such insurance shall be licensed in Virginia and shall be rated at least A (financial strength) and IX (size) by A.M. Best. Policies shall include all terms and provisions normally included in a policy of the type specified. The Owner shall be included as an additional insured on the liability policies.
- b. The Developer must maintain and furnish evidence of workers' compensation, employers' liability insurance, and the following general public liability and automobile liability insurance:

GENERAL LIABILITY: Combined single limit per occurrence of \$1,000,000; general aggregate of \$2,000,000; and umbrella liability of \$25,000,000 combined single limit per occurrence and \$25,000,000 general aggregate.

AUTOMOBILE LIABILITY: Combined single limit per occurrence of \$1,000,000.

Each policy must include substantially the following provision:

"It is a condition of this policy that the company furnishes written notice to the Owner thirty (30) days in advance of the effective date of any reduction in or cancellation of this policy."

- c. The Developer must furnish a certificate of insurance. Insurance must be effective, and evidence of

acceptable insurance furnished by Developer to Owner, before beginning performance under this Agreement. Evidence of renewal must be furnished not later than five days before a policy expires.

- d. The maintenance of insurance coverage as required by this Section 9.2 is a continuing obligation, and the lapse or termination of insurance coverage without replacement coverage being obtained will be grounds for termination for default.
- e. The Owner does not carry builder's risk insurance coverage. Developer, as a Reimbursable Expense, shall provide builder's risk insurance for 100% of the construction value and shall have Owner named as an additional insured. The Builder's Risk coverage shall include property in transit, on or off-premises, that will become part of the Project. The Builder's Risk coverage shall include any pre-existing portion of any building damaged as a result of the Project. Developer shall procure and maintain a builder's risk insurance policy on an "all risk", 100% replacement cost basis, until completion of the Project. The Developer agrees to endorse the policy with a manuscript endorsement eliminating the automatic termination of coverage in the event the building is occupied in whole or in part, or put to its intended use, or partially accepted by the Owner. The manuscript endorsement shall amend the automatic termination clause to only terminate coverage if the policy expires, is cancelled, the Owner's interest in the building ceases, or the building is accepted and insured by the Owner. Cessation of the Builder's Risk coverage shall be affirmatively coordinated by Developer with the Owner.
- f. Developer shall be responsible for filing and settling of claims and liaison with insurance adjusters.

### **9.3 Errors and Omissions.**

- a. The Developer must maintain Professional Liability insurance in the amount of \$5,000,000 per occurrence/\$5,000,000 general aggregate for errors and omissions.
- b. Unless the Developer's policy is prepaid, non-cancelable, and issued for a period at least equal to the term of this Agreement on an occurrence basis, the Developer shall have the policy amended to include substantially the following provision: "It is a condition of this policy that the company furnish written notice to the Owner thirty (30) days in advance of the effective date of any reduction in or cancellation of this policy."
- c. The Developer shall furnish a certificate of insurance. Insurance must be effective, and evidence of acceptable insurance furnished by Developer to Owner, before beginning performance under this Agreement. Evidence of renewal shall be furnished not later than five days before a policy expires.

### **9.4 Indemnification.**

The Developer shall hold harmless, defend and indemnify the Owner and its officers, boards and board members, agents, representatives, and employees from all claims, losses, damage, actions, causes of action, expenses, and/or liability regardless of the merit of same, including any related attorney fees, accountant fees, expert witness fees, consultant fees, court costs, per diem expenses, traveling and transportation expenses, or other such related costs resulting from, brought for, or on account of (i) any personal injury or property damage received or sustained by any person, persons or property growing out of, occurring, or attributable to any work performed under or related to this Agreement, to the extent resulting in whole or in part from negligent acts or omissions of the Developer, any Subcontractor, or any employee, agent, or representative of the Developer or any Subcontractor or anyone performing Work for the Project through them, (ii) any mechanics' or construction liens arising as a result of the Work, or (iii) any failure of the Project to comply with any applicable governmental laws, ordinances, rules and regulations.

## **9.5 Bankruptcy.**

In the event the Developer enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Developer shall notify Owner's Representative. The notification shall be sent to ensure its receipt within five (5) days of the initiation of the bankruptcy proceedings. The notification shall include the date on which the bankruptcy petition was filed, the court in which the petition was filed, and a list of Project contracts for which final payment has not yet been made. This obligation remains in effect until final payment under this Agreement. If a surety upon any bond furnished in connection with this Agreement or any insurance carrier providing coverage in connection with this Agreement becomes insolvent, the Developer shall promptly replace the bond or insurance policy with one which is equivalent and acceptable to Owner.

## **ARTICLE X**

### **NOTICES TO PROCEED, COMMENCEMENT AND COMPLETION**

#### **10.1 Initial Notice to Proceed.**

Execution of this Agreement by Owner constitutes Notice to Proceed with design and Construction Document preparation.

#### **10.2 NOTICE to Proceed for Construction, Prosecution, and Completion of Work.**

No construction work may be performed by or through Developer except pursuant to a Notice to Proceed with construction issued by the Owner's Representative. The Developer shall:

- a. Commence work under this Agreement within ten (10) days after the date it receives the Notice to Proceed from the Owner's Representative or receipt of the building permit, whichever is the later to occur.
- b. Prosecute the work diligently, and
- c. Substantially complete the construction work not later than sixteen (16) months from the date of commencement of the work, TIME BEING OF THE ESSENCE, but subject to all terms and conditions set forth herein for excusable delays.

Some work (preliminary sitework, demolition, shop drawings, fabrication, general conditions work, etc.) may have to be performed prior to the full commencement of construction. The time stated for completion includes cleanup of the site. Developer shall achieve Final Completion as soon as possible but not later than ninety (90) calendar days after Substantial Completion. At the time of receipt of the building permit and monthly thereafter, Developer shall consult with the Owner's Representative with regard to the likely Substantial Completion date and earlier occupancy dates so as to allow the Owner to plan its move.

#### **10.3 Notice of Delay.**

Immediately, and in no event no later than twenty-one (21) days after first becoming aware of any difficulties that might cause any delay under this Agreement, the Developer shall notify the Owner's Representative in writing of them. The notification must identify the difficulties, the reasons for them, and the estimated period of delay anticipated. Failure to give such notice in strict compliance with this Section 10.3 will waive any right by Developer to make a claim based upon such delay. Such notice shall be a condition precedent to Developer's right to pursue a claim for an adjustment to payment or schedule based upon such delay.

#### **10.4 Suspensions and Delays.**

- a. If the performance of all or any part of the work of this Agreement is unreasonably suspended,

delayed, or interrupted by:

1. An order or act of the Owner's Representative in administering this Agreement; or
  2. By a failure of the Owner's Representative to act within the time specified in this Agreement or within a reasonable time so as not to delay the work of the Developer; then the Developer may request an equitable adjustment to the Reimbursable Costs payable under this Agreement due to any increased costs caused by the delay or interruption (including the costs incurred during any suspension or interruption), and in the schedule and any other contractual term or condition affected by the suspension, delay, or interruption. However, no adjustment may be made under this Section 10.5.a. for any delay or interruption to the extent that performance would have been delayed or interrupted by the fault or negligence of the Developer or those providing work through Developer.
- b. A claim under this clause will not be allowed for any costs incurred before the Developer has notified the Owner's Representative in writing of the act or failure to act involved, or if Developer has failed to follow the procedures of Article XVII, Section 17.4 of this Agreement for such claim.

#### **10.5 Excusable Delays.**

Developer shall not be in default by reason of any failure in performing this Agreement in accordance with its terms (including any failure by the Developer to make progress in the prosecution of the work that endangers performance) if the failure arises out of causes beyond the control and without the fault or negligence of the Developer or those providing any services through Developer. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Owner, adverse governmental conditions, fires, severe floods, epidemics, pandemics, quarantine restrictions, outbreaks, disease and/or illness, strikes, freight embargoes, and weather, but in every case the failure to perform must be beyond the control and without the fault or negligence of the Developer or those providing any of the Services through Developer, including without limitation, the A-E, the Prime Construction Contractor, and any subcontractor, who shall plan for all contingencies which can be reasonably anticipated, such as unfavorable weather. Contingencies which can be reasonably anticipated shall not be considered a basis for claiming an excusable delay.

#### **10.6 Construction Schedule/ Progress Chart.**

- a. Within thirty (30) calendar days after receiving Notice to Proceed, the Developer shall prepare, or cause to be prepared, and submit to the Owner's Representative a complete detailed Project Schedule in the form of an electronic pdf file and of a practical progress chart. The schedule shall show the principal categories of work, corresponding with those used in the breakdown on which progress payments are based, the order in which the Developer proposes to carry on the work, the date on which it will start each category of work, and the contemplated dates for completion. The Project Schedule must be in suitable scale to indicate graphically the total percentage of work scheduled to be in place at any time. The Developer shall use a Critical Path Method (CPM) format. A critical path shall be developed based on scheduling logic that identifies all successor and predecessor activities and float. Activity constraints shall be avoided.

At the end of each progress payment period, or at such reasonable intervals as directed by the Owner's Representative, the Developer shall, or cause to be:

1. Revise the Project Schedule to reflect any changes in the work, completion time, or both, as approved by the Owner's Representative;
2. Enter on the Project Schedule the total percentage of work actually in place; and
3. Submit the adjusted Project Schedule, and a complete electronic update, to the Owner's Representative.

- b. If the work falls behind the Project Schedule after taking into consideration any excusable delays as defined above, Developer shall take such action as necessary to improve progress. The Owner's Representative may require the Developer to submit a revised Project Schedule demonstrating its proposed recovery plan to make up the lag in scheduled progress. If the Owner's Representative finds the proposed plan unacceptable, the Developer may be required to submit a new plan. If the new plan submitted is not reasonable, after consultation with the Developer, the Owner's Representative may require the Developer to increase the work force, accelerate the planned construction volume, increase assigned construction equipment, or the number of work shifts, without increase to the GMP.
- c. Failure of the Developer to comply with these requirements will be considered grounds for a determination by the Owner's Representative that the Developer is failing to prosecute the work with such diligence as will ensure its completion within the time specified.

#### **10.7 Exception to Completion Schedule and Liquidated Damages.**

In cases where the Owner's Representative determines in writing that sodding and/or planting and/or specified maintenance thereof is not feasible during the construction period, such work will be excepted from the completion. The work must be accomplished or completed during the first sodding and/or planting period or the specified maintenance period following the original completion date.

### **ARTICLE XI**

#### **DEVELOPER RESPONSIBILITIES**

##### **11.1 Performance and Superintendence of Work By Developer.**

- a. The Developer or its Prime Construction Contractor shall perform on the site, with its own organization, work equivalent to at least five percent (5%) of the total amount of work to be performed under this Agreement. The percentage of work required to be performed by the Developer or its Prime Construction Contractor may be reduced with written approval of the Owner's Representative.
- b. The Developer or its Prime Construction Contractor must give personal superintendence to the work either in person or by having a foreman or superintendent on the payroll, approved by the Owner's Representative, on the site at all times work is in progress.
  - 1. A minimum of one Developer's or its Prime Construction Contractor superintendent (on the Developer's or its Prime Construction Contractor payroll) must be provided on site to be responsible for coordinating, directing, inspecting, and expediting the work of the Prime Construction Contractor and its subcontractors.
  - 2. It is contemplated that all work will be performed during normal working hours, between the hours of 7:00 a.m. until 5:00 p.m., local time, unless otherwise specified in this Agreement. Work performed by the Developer at its own volition outside such normal working hours must be at no additional expense to the Owner. The Developer's material and equipment deliveries must not interfere with the arrival or departure of Owner employees and visitors to existing facilities.
- c. The Developer must refer requests received from occupants of buildings included in the work area to change the hours of work, including anticipated cost and schedule impact, to the Owner's Representative for resolution.
- d. The Developer shall, or the Prime Construction Contractor shall, submit a daily construction report the following working day on a form provided by the Owner's Representative. The report shall indicate the number of people by trade or craft, and the type and location of work. The report shall include subcontractors, safety and quality violations observed, corrective measures taken to correct the violations, and other information requested by the Owner's Representative. The Owner's Representative may modify the requirements of this report as the Project progresses.

### **11.2 Materials and Workmanship.**

- a. Unless otherwise specifically provided, all equipment and materials incorporated in the work must be new and of prime grade for the purpose intended. Unless otherwise specifically provided, reference to any equipment, material, or patented process by brand name, make, or catalog number establishes a standard of quality only. The Developer may substitute any equipment, material, or process that the Owner's Representative finds to be equal to that named, which finding shall be in writing.
- b. In the event of substitution in accordance with paragraph a above, the Developer shall furnish to the Owner's Representative for approval the manufacturer's name, the model number, and any other relevant information on the performance, capacity, nature, and rating of equipment or materials proposed for substitution. If requested by the Owner's Representative, samples must be submitted for approval at the Developer's expense, shipping charges prepaid. Materials or processes substituted without the Owner's approval may be rejected by Owner.
- c. The Developer shall obtain the Owner's Representative's written approval of the machinery and mechanical equipment incorporated into the work. The Developer shall submit samples of all materials and equipment as required by the specifications. Owner approval or rejection shall be based upon the Contract Documents.
- d. All work shall be performed in a skillful and workmanlike manner.

### **11.3 Responsibility for Design.**

- a. It is understood and agreed that this Agreement includes design services. The Developer agrees not to assign or transfer interests in this Agreement. The Developer agrees not to transfer or delegate, to others, its responsibilities under this Agreement except the Developer shall be allowed to subcontract portions of the Scope of Work. The Developer may engage Persons who are design professionals to provide design services for the Project. The Developer represents that the design professionals providing services for the Project include Persons with requisite Virginia licenses and registrations. The Developer further represents that the structural, electrical, mechanical and other engineering disciplines necessary for the design of the Project will be under the direct supervision of licensed professional engineers who are registered in Virginia or who are persons in responsible charge of an engineering firm registered in Virginia.
- b. The Developer is responsible for the professional quality, technical accuracy, and coordination of all designs, drawings, specifications, and other services furnished by the Developer under this Agreement. The Developer must without any changes to the Fixed Fees, GMP, and CCL, correct any errors or deficiencies in the designs, drawings, specifications, and other services.
- c. As part of the Developer's responsibility under this Agreement, the Developer shall ensure that the design and construction of the Project comply with applicable codes and standards, including without limitation the Americans with Disabilities Act.
- d. Any Owner review, approval, or acceptance of, or payment for, any of the services required under this Agreement shall not be construed to relieve Developer of any obligation under this Agreement. The Developer shall remain liable to the Owner for all damage caused by the Developer's performance of any Services furnished under this Agreement that is negligent or fails to meet the requirements of this Agreement.
- e. The rights and remedies of the Owner provided for under this Agreement are in addition to any other rights and remedies provided by law.

#### **11.4 Use of Premises.**

- a. The Developer, the Prime Construction Contractor, and any subcontractors and their employees shall comply with the regulations governing access to, operation of, and conduct while on the site and shall perform the work required under this Agreement so as not to unreasonably interfere with the conduct of Owner business or use and occupancy by Owner tenants except as indicated in Exhibit B.
- b. As permitted by the site conditions, the Developer shall separate its personnel, the Prime Construction Contractor's personnel, and subcontractors' personnel from Owner visitors, employees, and Owner property not involved in the Project. The Developer shall cordon off, or cause to be cordoned off, the construction area using barricades or other means to achieve this separation.
- c. Any requests received by the Developer from occupants to change the sequence of work shall be referred to the Owner's Representative.
- d. The Developer, any subcontractors, and their employees will not have access to any Owner facility outside the scope of this Agreement without permission of the Owner's Representative except as provided in Exhibit B.
- e. Developer shall provide a Site Utilization Plan for Owner review at the time of the revised design development submission.

#### **11.5 Permits and Responsibilities.**

- a. The Developer is responsible for obtaining any necessary licenses and permits at Developer's expense, and for complying with the codes and standards in connection with the prosecution of the work. The Developer is responsible for all injury to persons or damage to property that occurs as a result of its negligence. The Developer must take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Developer is responsible also for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction that may have been accepted.
- b. The Developer shall demonstrate compliance with all environmental permit, assessment, or impact statement requirements and regulations identified in the Contract Documents prior to, and during construction.

#### **11.6 Building Codes, Fees, and Charges.**

- a. The Developer shall comply with all state and local building code requirements.
- b. The Developer shall pay all fees and charges for connections to outside services and for use of property outside the site.

#### **11.7 Federal, State, and Local Taxes.**

- a. The CCL and GMP include all applicable federal, state, and local taxes and duties.

#### **11.8 Identification of Contract Deliverables.**

Unless otherwise specified, the cover page of each document prepared and submitted by the Developer to the Owner under this Agreement must include the following information:

- a. Name and business address of the Developer.
- b. Contract number.
- c. Name, position, and office location of the Owner's Representative's.

- d. Date of document.

#### **11.9 Patent and copyright Indemnity.**

- a. Except as provided in paragraph d below, the Developer shall indemnify, defend and hold harmless the Owner, its employees, officers, boards, board members, representatives and its agents against liability, including other such costs and fees as further set out in Section 9.4 above, from any claim of patent and/or copyright infringement (or unauthorized use) arising from any of the Services provided by or through Developer for the Project.
- b. The Owner shall promptly notify the Developer of any claim or suit subject to paragraph a above.
- c. This indemnification does not apply to claims of infringement of a patent and/or copyright resulting from the Owner's Representative's specific written direction, compliance with which requires the infringement.
- d. This clause must be included in all subcontracts under this contract, at any tier, over \$50,000.

#### **11.10 Non-Disclosure.**

The Developer shall not disclose any information received from the Owner that is marked confidential unless such disclosure is required by law or approved by the Owner, such approval not to be unreasonably withheld, conditioned or delayed.

#### **11.11 Debris and Cleanup.**

- a. On a daily basis during the progress of the work, the Developer must remove and dispose, or cause to be removed and disposed, of the resultant debris and keep the site neat and clean.
- b. The Developer shall, upon completion of the work, remove all construction equipment and surplus materials (except materials or equipment that are to remain Owner property as provided by this Agreement), and leave the site in a clean, neat, and orderly.

#### **11.12 Heat.**

Unless otherwise specified, or unless directed otherwise by the Owner's Representative in writing, the Developer shall provide heat as necessary to protect all work materials and equipment against injury from dampness and cold, and in the case of information technology equipment requiring the same, air conditioning, to protect it from heat and humidity.

#### **11.13 English Language Requirement of On-Site Superintendent.**

The Developer's on-site superintendent must be able to speak, read, and write English to the extent necessary to permit reasonable communication with Owner personnel.

#### **11.14 Substitute Materials or Methods.**

Where the technical provisions permit the Developer to propose substitute materials, items, systems, or equipment, the selection of such options is subject to the following conditions:

- a. Once a substitute has been selected and approved by the Owner's Representative, it must be used for the entire Project unless the Developer has proposed, and Owner's Representative has approved, the substitute for a limited application
- b. The Developer must coordinate its selection with the drawings and specifications and the A-E.

- c. Substitutions proposed by Developer shall be at no increase to the GMP.

#### **11.15 Advertising of Awards.**

Except with the Owner's Representative's prior approval, the Developer agrees not to refer in its commercial advertising to imply in any manner that the Owner endorses its products.

#### **11.16 Ground Breaking Ceremonies.**

Developer agrees to participate in groundbreaking ceremonies at a time specified by the Owner.

### **ARTICLE XII**

#### **OWNER RIGHTS, RESPONSIBILITIES AND DUTIES**

##### **12.1 Owner's Representative.**

The Owner may appoint an Owner's Representative, who may be either an Owner employee or a contractor. The name, address, telephone number, and specific responsibilities, authority, and limitations of the Owner's Representative will be provided to the Developer in writing. The Owner's Representative may be removed or replaced at any time without prior notice to the Developer, but notification of the change, including the name and address of any successor Owner's Representative, will be provided promptly to the Developer by the Owner, in writing.

a. The Owner's Representative will represent the Town during the construction period. The Town shall notify Developer of the name and contact information for the Owner's Representative on the effective date of this Agreement and shall immediately provide notices of any changes to Owner's Representative and/or delegation of authority.

b. The Owner's Representative will make visits to the site at intervals appropriate to the various stages of construction as the Owner's Representative deems reasonably necessary in order to observe, as an experienced and qualified individual, the quality of the various aspects of the Developer's executed work. The Owner's Representative will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work. The Owner's Representative's efforts will be directed toward providing for the Owner a greater degree of confidence that the completed work will conform generally to the Contract Documents and is proceeding in a timely manner. On the basis of such visits and on-site observations, the Owner's Representative will keep the Owner informed and will take any action necessary to guard the Owner against defective work. The Owner's Representative's visits and on-site observations are subject to all the limitations on the Owner's Representative's authority and responsibility set forth below. The Owner's Representative will not supervise, direct, control, or have authority over or be responsible for the Developer's means, methods, techniques, sequences or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of the Developer to comply with laws, regulations and ordinances applicable to the furnishing or performance of the work. Visits by the Owner's Representative shall be in addition to such inspections that are required pursuant to permits issued under the Uniform Statewide Building Code and other laws, regulations and ordinances.

c. The Owner's Representative may authorize minor variations in the work from the requirements of the Contract Documents which do not involve an adjustment in the price under the Contract Documents or the Project Schedule and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. These may be accomplished by a field order and will be binding upon the Town and on the Developer who shall perform the work involved consistent with the Contract Document within a period of time as agreed to by the parties. If the field order would result in an

adjustment in the price under the Contract Documents or the Project Schedule, it may be rejected by the Developer.

d. The Owner's Representative shall not have authority to accept nor reject work. The Owner's Representative shall issue notices of non-conforming work to the Developer within five (5) business days of identification of work which he believes is defective or does not conform to the Contract Documents. The Developer shall deliver a written response to the Owner's Representative within seven (7) days of such Notice. The response of the Architect, absent manifest error, shall be conclusive and binding upon all parties, unless the Owner gives notice in writing of its intention to dispute the Developer's determination within ten (10) days of receipt of the Developer's response.

e. The Owner's Representative, subject to approval by the Town Manager, may delegate activities listed herein to individuals upon written notification to the Developer, but shall retain oversight responsibilities over such delegates. Notwithstanding the authority to delegate activities as previously explained, Developer shall only be liable for and responsible to take direction from Owner's Representative. Owner's Representative may only communicate with Developer's Development Manager and Prime Construction Contractor's Project Manager and Project Superintendent and the Architect when necessary (with a copy of such correspondence sent to Developer and/or inclusion of Developer in said discussion).

f. The Developer shall take action to ensure that, to the extent reasonably practicable the Owner's Representative has free and unimpeded access to any and all portions of the Work during construction of the Project. The Owner's Representative shall give to give Developer 72-hour advance notice (except in cases of emergency) of his or her intent to visit the Project and a list of the names of the persons who will accompany Owner's Representative and each person's role with the Project. The Developer shall also act to ensure the Owner's Representative is notified about, and invited to attend, all jobsite meetings and conferences as scheduled to coordinate the work. Notwithstanding the foregoing, the Developer retains the right to meet with its Contractors and subcontractors from time to time in the normal course without notice to Owner's Representative. The Developer shall also act to keep the Owner's Representative informed concerning the future Project schedule and the planned installation of key materials and equipment, including but not limited to soil excavations and replacements, concrete placements, steel erection, stormwater infrastructure and testing of electrical, alarm, and HVAC systems.

## **12.2 Site Visits.**

- a. The Owner from time to time during construction may desire to conduct groups of guests on visits to the site of the work. These tours will be authorized by the Owner's Representative or his appointed representative and such visit shall be noticed to Developer not less than seventy-two (72) hours in advance of each such visit. In such event the Developer shall cooperate by providing access to and posting signs to give notice of dangerous areas, providing hard hats, and making such other arrangements for the safety and convenience of the guests as may be required. The Owner's Representative shall schedule any such visits so as not to interfere with the progress of the work.
- b. The Developer's indemnification of the Owner contained in Section 9.4 of this Agreement shall not apply during any such visits to guests of the Owner or to Owner officers, employees, or agents who are engaged in conducting, guiding, or accompanying any such visits, leaving the Owner and the Developer responsible for their own acts and omissions according to applicable law and other clauses of this Agreement. This limited exception in this Section 12.2.b to Developer's indemnification obligation does not apply to inspections, investigations, or official site visits provided for elsewhere in this Agreement or conducted for the purpose of aiding in the enforcement of law.

### **12.3 Examination of Records.**

- a. The Owner and its authorized representatives shall, until three (3) years after final payment under this Agreement, have access to and the right to examine any pertinent books, documents, papers, or other records of the Developer involving transactions related to this Agreement that are paid for on a cost reimbursable basis.
- b. The Developer agrees to include in all subcontracts under this Agreement and to have its Prime Construction Contractor include in all its subcontracts a provision to the effect that the Owner and its authorized representatives will, until three years after final payment under this Agreement, have access to and the right to examine any pertinent books, documents, papers, or other records of the Prime Construction Contractor and subcontractors involving transactions related to the work performed on a cost reimbursable basis and further providing that such individuals shall otherwise comply with the provisions contemplated by Section 12.4c. The term subcontract as used in this clause excludes:
  1. Purchase orders; and
  2. Subcontracts for public utility services at rates established for uniform applicability to the general public.
- c. For the purposes of this Section 12.4, the Developer agrees to provide Owner adequate and appropriate work space at the Developer's facilities in order to conduct such examinations.

### **12.4 Ownership of Work Product.**

- a. Work Product: All drawings, specifications and other documents and electronic data furnished by the Developer to the Owner under this Agreement and the copyrights thereto ("Work Product") are owned by Developer or its design professionals, as they may agree among themselves, with Owner having the license rights granted by this Agreement.
- b. Owner's Limited License to Use for Renovations, Etc.: Developer hereby grants Owner a limited license to use the Work Product in connection with Owner's occupancy and use of the Project, including for maintenance and repairs, future renovations, and expansions, conditioned on use of the Work Product for renovations and expansions being at Owner's sole risk and without liability or legal exposure to Developer or anyone working by or through Developer, including design professionals of any tier (collectively the "Indemnified Parties.")
- c. Owner's Limited License upon Termination for Convenience. If Owner terminates this Agreement with the Developer for its convenience, the Developer hereby grants Owner a limited license to use the Work Product to complete the Project, for its occupancy and use, and for maintenance and repairs, future renovations, and expansions by the Owner. Use of Work Product (i) that does not represent approved Plan and Specifications, or (ii) for renovations and expansions, shall be at the Owner's sole risk without liability or legal exposure to any Indemnified Party.
- d. Owner's License upon Developer's Default. If this Agreement is terminated due to Developer's default, Developer hereby grants Owner a license to use the Work Product in connection with Owner's completion and occupancy of the Project, for maintenance and repairs, and for future renovations and expansions by the Owner.
- e. Owner's Indemnification for Use of Work Product. If Owner uses the Work Product under Section 12.5. b or c of this article, Owner shall defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorney's fees and other such costs set forth in Section 9.4, above, arising out of or resulting from the use of the Work Product for renovations and expansions or to complete the Project.
- f. Nothing in this Section 12.4 shall be deemed to relieve Developer or any design professionals providing services through Developer of their obligation under this Agreement that all design and

design services provided for this Project meet the standard of care in Virginia for the applicable design professional providing such design or services.

- g. The licenses granted to Owner pursuant to this Section 12.5 are at no additional cost to Owner beyond the compensation required by this Agreement for the Services.

#### **12.6 Owner Partial Occupancy.**

- a. The Owner's Representative reserves the right of partial occupancy or use of facilities, services, and utilities, before final acceptance, without implying completion or acceptance of any part of the Project by the Owner. Before such occupancy or use, the Owner's Representative must furnish the Developer an itemized list of work remaining to be performed or corrected. Failure to list an item will not relieve the Developer of the responsibility for complying with the terms of the Contract Documents. Responsibility for damage to the work within the partially occupied area shall be transferred to the Owner for any such partial occupancy or use.
- b. Costs incurred and delays to the completion of the Project as a result of such partial occupancy or use of facilities, services, and utilities are subject to equitable adjustment under Article XVII, Section 17.1.

#### **12.7 Other Contracts.**

The Owner may award other contracts for additional work, and the Developer will reasonably cooperate with the other contractors and Owner employees, and carefully fit in its own work as may be directed by the Owner's Representative. The Developer must not unnecessarily commit or permit any act that will interfere with the performance of work by any other contractor or by Owner employees. Should contractors or Owner employees delay the Developer, cause any damage to Developer's work or otherwise cause an increase in the Developer's cost or time of performance, the contract sum and contract time shall be equitably adjusted.

#### **12.8 Records Inspection and Copying.**

Developer agrees that the Owner may, at its option and expense, inspect and copy all records relating to the Services provided under this Agreement to the extent necessary to confirm compliance with the terms of the Agreement.

#### **12.9 Owner Responsibilities.**

The Owner shall:

- a. pay the costs of the Project according to a payment schedule as set forth in the Contract Documents and exhibits;
- b. perform any and all other actions necessary to complete the requirements of the Contract Documents;
- c. grant the Developer the exclusive right to develop the Project under the terms and conditions set forth in the Contract Documents; and

- d. provide to the Developer written notice of any default actually known to the Owner under any of the Contract Documents to which the Owner is a party or any event actually known to the Owner that with written notice or the passage of time would lead to a default.

### **ARTICLE XIII**

#### **ADMINISTRATIVE ITEMS**

##### **13.1. Standard References.**

All publications and other documents (such as manuals, handbooks, codes, standards, and specifications) cited in this Agreement for the purpose of establishing requirements applicable to equipment, materials, or workmanship are hereby incorporated by reference in this Agreement.

### **ARTICLE XIV**

#### **SUBCONTRACTING**

##### **14.1 Subcontracts**

- a. Nothing in this Agreement may be construed to create any contractual relationship between any subcontractors and the Owner. The divisions or sections of the specifications are not intended to control the Developer in dividing the work among subcontractors or to limit the work performed by any trade.
- b. The Developer is responsible to the Owner for acts and omissions of its own employees, of subcontractors and their employees, and any other person providing work on the Project through Developer. The Developer is also responsible for the coordination of the work of the trades of subcontractors.
- c. The Owner will not undertake to settle any differences among the Developer, the Prime Construction Contractor, the A-E, and subcontractors or any of them.

### **ARTICLE XV**

#### **PROTECTION OF PERSONS AND PROPERTY**

##### **15.1 Accident Prevention.**

- a. All construction work on this Project must be performed in compliance with the Occupational Safety and Health Act of 1970 and with local or state occupational safety and health regulations enforced by an agency of the locality or state under a plan approved by the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA). Where requirements are different or in conflict, the more stringent requirement will apply.
- b. The Developer shall maintain an accurate record of exposure data and all accidents incidental to work performed under this contract resulting in death, traumatic injury, occupational disease, or damage to property, material, supplies, or equipment. The Developer must submit regular Project safety reports, exposure data, and accident reports, as prescribed by the Owner's Representative.
- c. Health and Safety Plans are required as follows:
  - 1. Prior to commencing on-site work, the Developer must submit to the Owner's Representative, in triplicate, a Health and Safety Plan designed to provide a system by which hazards on the Project site will be controlled to minimize or eliminate occupational injuries or illnesses during performance of the contract.
  - 2. The Health and Safety Plan must state that the Prime Construction Contractor, A-E, and all subcontractors are required to comply with the Developer's Project safety rules and requirements

issued under the authority of that program.

3. The Health and Safety Plan must identify, by name, the Developer's representative responsible for the execution of the Project safety program. The Developer's Project safety representative must have the express written authority from the Developer to stop work, to abate hazardous conditions or unsafe practices, and to eject any Developer, Subcontractor, or vendor employees from the Project site for failure to comply with safety requirements.
4. When conducting work at existing Owner facilities, the Health and Safety Plan must include the precautionary measures to be taken to protect Owner staff, faculty, students, employees and the public.
- d. The authority, responsibilities, and duties of the Developer's Project safety representative must be incorporated as part of the written Health & Safety Plan. The safety responsibilities include, but are not limited to, conducting subcontractor construction safety program reviews, conducting employee safety orientation training, conducting weekly safety meetings, conducting daily site safety inspections, auditing Subcontractor safety compliance, and preparing required periodic and special safety reports.
- e. In addition to the general requirements of Health and Safety Standards, the Developer, A-E and Prime Construction Contractor, specifically must comply with applicable OSHA requirements concerning Hazard Communications Standards. Details of the Developer's hazard communications program shall be included in the Health & Safety Plan.

## **15.2 Health and Safety Standards.**

- a. In performing this contract, the Developer must:
  1. Comply with applicable Occupational Safety and Health Standards promulgated pursuant to the authority of the Occupational Safety and Health Act of 1970 (OSHA).
  2. Comply with any other applicable federal, state, or local regulations governing workplace safety to the extent they do not conflict with a.1 above; however, the more stringent shall apply.
  3. Comply with any Owner standard unless the OSHA standard contains more rigorous or stringent safety requirements, in which case the OSHA standard governs and takes precedence.
  4. Take all other proper precautions to protect the safety and health of the Developer's employees, Owner staff, faculty, students, employees, and the public.
- b. The Developer must coordinate its use of existing Owner premises with the Owner's Representative. Subjects of this coordination include the designation of work and storage areas; the extent, if any, of use by the Developer of Owner tools and equipment; the furnishing by the Developer of appropriate signs and barricades to exclude unauthorized personnel from the work areas and to call attention to hazards and dangers; and other matters relating to the protection of Owner staff, faculty, students, employees, property and the public.
- c. Materials, supplies, articles, or equipment manufactured or furnished under this contract or order must conform to the Occupational Safety and Health Standards pursuant to the authority of OSHA, and to other safety and health requirements specified in this contract or order. When conducting work on existing facilities, the Developer must provide the Owner's Representative copies of Material Safety Data Sheets (MSDS) for any hazardous material, as defined by OSHA's Hazard Communications Standards, to be used on the job.
- d. If no OSHA standard exists, federal or other nationally recognized standards apply. Copies of current Occupational Safety and Health Standards are available from regional and/or area offices of the U.S. Department of Labor, Occupational Safety and Health Administration.

### **15.3 Protection of the Environment, Existing Vegetation, Structures, Utilities, and Improvements.**

- a. The Developer shall perform all work necessary to implement and accomplish a program to prevent environmental pollution during or as a result of construction performed under this Agreement. As a minimum, the Developer's work must conform to all requirements of applicable federal, state and local law.
- b. The Developer must preserve, protect and maintain all existing vegetation (such as trees, shrubs, and grass), landscape features, athletic fields, and structures on or adjacent to the site of work that are not to be removed. Care must be taken in removing trees authorized by the Owner's Representative for removal, to avoid damage to vegetation that will remain in place. Any trees or other landscape features scarred or damaged by the Developer's equipment or operations must be restored by the Developer. The Owner's Representative decides what method of restoration must be used and whether damaged trees and/or shrubs will be treated or replaced. The Developer shall use guard posts or barriers as necessary to control vehicular traffic passing close to trees and/or shrubs to remain. Areas disturbed, such as temporary roadways or embankments, must be restored to near natural conditions that will permit the growth of vegetation. Disturbed areas must be graded and filled as required, covered with six inches of topsoil and landscaped as per the Contract Documents.
- c. The Developer shall protect from damage all existing improvements or utilities at or near the site of the work, the location of which is known, and must repair or restore any damage to these facilities resulting from failure to comply with the requirements of this contract or to exercise reasonable care in performing the work. If the Developer fails or refuses to repair such damage promptly, the Owner's Representative may have the necessary work performed and charge the cost to the Developer.
- d. The Developer shall obtain approval from the Owner's Representative for any temporary roads, embankments and disposal areas not included in Project specifications or drawings and restore such areas to original conditions, including appropriate landscaping, upon the completion of work.
- e. Monuments, markers and works of art must be protected. Items discovered that have potential historical or archeological interest must be preserved. The Developer must leave the archeological find undisturbed and must immediately report the find to the Owner's Representative so that the proper authority may be notified. The contract sum and contract time shall be equitably adjusted if the Developer incurs additional cost or time to perform as a result of any such discovery.
- f. Developer shall follow all Environmental Protection Agency, Department of Environmental Quality and other applicable governmental regulations and guidelines, as to the labeling, use, storage and disposal of "hazardous waste", which shall for the purposes of this agreement be defined as (a) any chemical, substance, material, mixture, contaminant or pollutant, now or hereafter defined as a "hazardous substance" under the comprehensive Environmental Response, Compensation and Liability Act, as amended from time to time; (b) petroleum, crude oil, or any fraction thereof; (c) any pollutant, contaminant, special waste or toxic substance now or hereinafter listed, defined by or subject to regulation under any federal, state or local statute, ordinance, rule, regulation, standard, policy, guidance, permit, order, administrative or judicial decision or pronouncement, previously, currently or hereafter in effect, as amended from time to time, pertaining to health, safety, or the environment, including without limitation, natural resources, environmental regulation, contamination, pollution, cleanup, or disclosure. Developer agrees to indemnify, hold harmless and defend Owner and all Owner's successors, employees, officers, boards, board members, representatives, and agents from any liability, claim, demand, action, cause of action, suit, loss, damage, injury, expense, cost, settlement, or judgment of any kind or nature including but not limited to demands, fines, remediations, or penalties asserted by any governmental entity, as a result of the treatment, storage, disposal, handling, spillage, leakage, or presence in any form in soils, surface waters, groundwaters, air, or property, of any wastes

or “hazardous waste” as defined in this paragraph, at the subject property, to the extent caused or contributed to by Developer or Developer’s subcontractors.

#### **15.4 Access to Site.**

- a. The Developer’s access to the site and use of existing roads will be as needed by Developer at its sole discretion.
- b. Developer shall not permit workers to carry firearms or other deadly weapons onto any Owner construction site or into any facility, including in their personal or construction vehicles. This supercedes any state or local law permitting the carrying of firearms or weapons. Violation of this clause shall be grounds for removal of individuals or contractors from the site or termination for default.

#### **15.5 Handling Asbestos and Other Hazardous Materials.**

The Developer shall be responsible for handling any known asbestos or other known hazardous or contaminated materials existing on the site.

#### **15.6 Elevator Work-Qualifications.**

- a. The Developer, Prime Construction Contractor, or the subcontractor whom the Developer uses for performance of the elevator work, must have had at least three (3) years of successful experience in installing and servicing elevators.
- b. In addition, the Developer, the Prime Construction Contractor, or its subcontractor must have installed, on at least two prior projects, elevators comparable to those required for this Project that have performed satisfactorily under conditions of normal use for a period of not less than one (1) year. To be considered comparable, prior installations must have not less than the same number of elevators operating together in one group as the largest number in any group specified for this Project, except that a group of four may be considered comparable to a large group specified for this Project.
- c. A list of the prior comparable installations by the Developer, the Prime Construction Contractor, or its subcontractor, together with the names and addresses of the buildings, the names of the owners or managers, and any other pertinent information required must be submitted promptly upon request of the Owner.
- d. The names, addresses, experience, and statement of work to be performed by each subcontractor or second-tier subcontractor whom the Developer, Prime Construction Contractor, or the principal subcontractor, as the case may be, will use for performance of minor portions of the installation of elevators must also be submitted promptly upon request of the Owner.
- e. The Owner may reject the proposed elevator subcontractor if it is determined that it has failed to meet the experience requirements, or if it has been found to have an unsatisfactory record of prior elevator installations. In the case of rejection, the Developer must resubmit another name within ten (10) days for renewed consideration.

### **ARTICLE XVI**

#### **PAYMENTS**

##### **16.1 Invoices (Construction).**

- a. The Developer’s invoices must be submitted before payment can be made.
- b. The Developer agrees that submission of an invoice to the Owner for payment is a certification that:

1. Any services being billed for have been performed in accordance with the requirements of the Contract Documents; and
  2. Any supplies for which the Owner is being billed have been delivered or suitably stored off site, with appropriate insurance coverage, and in the quantities shown on the invoice, and that the supplies are in the quantity and of the quality designated in the Contract Documents. Developer shall provide, suitable to Owner's Representative approval, evidence of insurance for storage facility, a complete inventory of items, a written right of access to the items, and certification of title to the Owner.
- c. To ensure proper payment, Developer must furnish all documents required elsewhere in the Contract Documents and/or as reasonably required by the Owner's Representative.

## **16.2 Payment.**

### **Reimbursable Costs for Construction:**

1. The Owner will make progress payments monthly within thirty (30) calendar days of receipt of the Developer's invoice or at more frequent intervals as determined by the Owner's Representative. Before the first progress payment becomes due, the Developer must prepare a schedule of values reasonably acceptable to the Owner's Representative. The values in the breakdown will be used for determining progress payments.
2. If material delivered to the Project site that will be incorporated into the Project will be taken into consideration in computing progress payments, before each payment is made, the Developer must furnish the Owner's Representative proof of the quantity, value, and delivery of such material.
3. In making progress payments, the Owner's Representative will retain five percent (5%) of the progress payments earned on the construction portion of the work. Owner hereby expressly permits and instructs Owner's Representative to release retainage to subcontractors who have completed their respective portion of the work upon completion of same.
4. All material and work covered by progress payments will be the sole property of the Owner. However, this paragraph does not:
  - (a) Relieve the Developer of responsibility to protect and safeguard material and work for which payment has been made or for restoration of any damaged work; or
  - (b) Waive the right of the Owner to require fulfillment of all terms of the Contract Documents.
5. Before receiving a progress payment or final payment under this Agreement, the Developer must certify to the Owner's Representative that payment due to the Prime Construction Contractor and subcontractors have been made from the proceeds of prior payments or will be made in a timely fashion from the payment then due the Developer.
6. Upon completion and acceptance of all work, the amount due the Developer under this Agreement shall be paid upon presentation of a properly executed invoice, after the Developer has furnished the Owner with a release of all claims against the Owner arising by virtue of this Agreement, other than claims in stated amounts that must be specifically excepted by the Developer from the operation of the release. If the final cost as audited by the Owner is less than the GMP, the final invoice shall include any share in savings (see Section 5.7). If the sum of all progress payments and the final invoice is greater than the GMP, the final invoice shall be adjusted so that the sum of all progress payments and the final payment is not greater than the GMP. If the Developer's claim to amounts payable under the Agreement has been assigned as provided in the Assignment of Claims clause, a release may also be required of the assignee.

### **16.3 Construction Cost Breakdown.**

The Developer's submission of their Guaranteed Maximum Price (GMP) must include a construction cost breakdown by CSI Division and other breakdowns as reasonably requested by Owner's Representative. The Developer shall provide copies of its contract with its Prime Construction Contractor and a comparison to the GMP, for approval by the Owner's Representative, and for use in verifying monthly construction invoices.

### **16.4 Allowable Cost and Payment.**

- a. **Invoicing:** The Owner will make payments to the Developer when requested as work progresses, but not more than monthly, in amounts approved by the Owner's Representative, such approval not to be unreasonably withheld. The Developer must submit an invoice or voucher to the address specified by Owner, supported by a statement of claimed allowable costs of performing this Agreement, in such form and detail as the Owner's Representative may reasonably require.
- c. **Final Payment:**
  - 1. The Developer must submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but not later than one year (or longer, as the Owner's Representative may approve in writing) from the completion date. Upon approval of that invoice or voucher, and upon the Developer's compliance with all terms of this contract, the Owner will promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.
  - 2. In exchange for final payment the Developer shall release the Owner and its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this Agreement, except for those that have been identified as open in the final invoice.

## **ARTICLE XVII**

### **CHANGES/CLAIMS/DISPUTES**

#### **17.1 Changes.**

- a. The Owner may at any time, without notice to any sureties, by written change specifically designated or indicated to be a Change Order or Change Directive, make a Change, including, without limitation, one that:
  - 1. Changes the plans and specifications (including drawings and designs);
  - 2. Changes the method or manner of performance of the work;
  - 3. Changes the Owner-furnished facilities, equipment, materials, services, or site; or
  - 4. Directs acceleration in the performance of the work.
- b. Any other written or oral order, direction, instruction, interpretation, or determination from the Owner that causes a change to the Scope of Work or its duration will only be treated as a Change Directive, allowing a change in compensation or schedule, only if (1) the Developer gives the Owner's Representative written notice as soon as possible, but not later than within twenty-one (21) days, of the receipt by Developer, the Prime Construction Contractor, or any subcontractor, whichever has first receipt of such order, direction, instruction, or determination, stating (i) the date, circumstances, and source of the order, direction, instruction or determination, and (ii) that the Developer regards the order, direction, instruction or determination as a Change, and (2) Developer does not incur additional costs attributable to such order, direction, instruction or determination without first receiving a Change Directive from Owner unless waiting for a Change Directive is clearly unreasonable under the circumstances.
- c. Except as provided in this Section 17.1, no order, direction, instruction, interpretation, determination,

statement, or conduct of the Owner's Representative may be treated as a Change or entitle the Developer to any adjustment in compensation or schedule.

- d. If any Change under this Article causes an increase or decrease in the Developer's cost of, or the time required for, the performance of any part of the work under this Agreement, the Owner shall issue a Change Order or Change Directive. However, no claim for any Change shall be allowed for which the Developer has not strictly complied with the requirements of paragraph b as well as all other requirements of this Agreement. No claims will be allowed for defective plans or specifications prepared by or for the Developer.
- e. No claim by the Developer will be allowed if asserted after final payment under this Agreement.
- f. After approval of final Plans and Specifications, except for the correction of errors and omissions, the Developer shall not make or allow any changes in the plans or specifications, including drawings and designs, without approval of the Owner's Representative.
- g. The GMP shall be adjusted for overruns and underruns in the allowances. The Developer shall include in the GMP all allowances stated in this Agreement. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner's Representative may direct or as required to perform the work, but the Developer shall not be required to employ persons or entities to whom the Developer has reasonable objection. Unless otherwise provided in this Agreement, allowances shall cover the Reimbursable Costs to the Developer of materials and equipment delivered at the site and all required taxes, cost for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts; and whenever Reimbursable Costs described in this paragraph are more or less than allowances, the GMP shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect the difference between actual Reimbursable Costs and the originally stated allowance. Materials and equipment under an allowance shall be selected by the Owner's Representative in sufficient time to avoid delay in the work. Allowance overruns may be deducted from the Owner's portion of savings, if any, in the Developer's contingency, with the Developer's approval such approval, to be at the sole discretion of Developer.
- h. The Developer shall not proceed with any Change until the Owner has obtained all necessary approvals and funds to pay for the Change.

## **17.2 Change Order Accounting.**

The Owner's Representative may require Change and Change-order accounting whenever the estimated cost of a Change or series of related Changes exceeds \$100,000. The Developer, for each Change or series of related Changes, must maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable, direct costs (less allocable credits) of work, both changed and not changed, allocable to the Change. The Developer shall maintain such accounts until the parties agree to an equitable adjustment for the Changes ordered by the Owner's Representative or the matter is finally disposed of in accordance with Section 17.4.

## **17.3 Equitable Adjustments.**

### **a. Fixed Fees for A-E Services:**

- 1. There will be no monetary adjustment to any of the Fixed Fees component for Architect-Engineer Services under this Agreement except where the Scope of Work has been modified by the Owner. The A-E component of Fixed Fees for such Scope of Work changes will only be adjusted when the Owner-requested change requires a duplication of work that has already been accomplished, causes an appreciable increase in direct labor, material or other costs to work included under the A-E component of the Fixed Fees, or requires new labor, material or other direct costs of work

not included under the existing A-E component of the Fixed Fees. All other changes required to complete the work will be the responsibility of the Developer.

2. Adjustment in the A-E component of Fixed Fees will be based upon the extent of change to the work and not upon a percentage of construction costs. The Owner will negotiate an adjustment on the basis of the costs per discipline for the production of drawings, calculations, specifications, estimating and other services. Prior to negotiations, the Developer shall submit an Estimate of Fee for Modification of Design.
3. Where a proposal for a Fixed Fees modification is submitted by the Developer, the overhead, profit and commission percentages included in the proposal will be based solely on changes in labor, material, or other direct costs covered under the Fixed Fees. The percentages for overhead, profit and commission will be negotiated and may vary according to the nature, extent, and complexity of the work involved. Not more than three percentages, not to exceed the maximum percentages shown below, will be allowed regardless of the number of tiers of subcontractors; that is, the markup on work subcontracted by a subcontractor will be limited to one overhead percentage and one profit percentage in addition to the Developer's commission percentage. On proposals covering both increases and decreases of the Fixed Fees of the Agreement, the overhead, profit, and where applicable commission will be computed on the net change only.

	Overhead	Profit
To Developer on work performed by other than own forces	3%	3%
To Architect and/or the subcontractors for that portion of work performed with their respective forces	140%*	10%*
* billable rate multiplier		
To Prime Contractor	3%	3%
To Subcontractor	10%	5%

4. The Developer must submit with its proposal its request for time extension (if any).
5. In considering a proposal, the Owner may check estimates in detail, utilizing unit prices where specified or agreed upon, with a view to arriving at an equitable adjustment.
6. Upon written request by the Owner's Representative, the Developer must submit a proposal, in accordance with the requirements and limitations set forth in subparagraphs (a.1) through (a.6) of this clause, for work involving proposed changes covered by the request, within the time limit indicated in the request or any extension of such time limit as may be subsequently granted. If, within a reasonable time after the receipt of such proposal, the Owner's Representative orders the Developer to proceed with the performance of the work contemplated, the proposal submitted prior to the order will constitute the Developer's statement of the monetary extent of claim for equitable adjustment to any component of the Fixed Fees.

**b. Reimbursable Costs and Fixed Fees For Development and Construction:**

1. There will be no monetary adjustment to the GMP under this Agreement except when the Scope of Work has been modified by the Owner by Change and except as allowable under the other provisions of this Agreement. All other changes required to complete the work shall be the responsibility of the Developer.
2. In the event of a Change, an appropriate monetary adjustment to the GMP will be made if all the requirements of this Agreement are met. The Developer's written statement of the monetary extent of any claim for equitable adjustment under this Agreement must be submitted in the form of a lump sum proposal (unless otherwise requested) with an itemized breakdown of all increases

or decreases in the cost of the Developer's and all subcontractors' work, in at least the following detail:

- (a) Material quantities and unit cost
  - (b) Labor costs (identified with the specific item of material to be placed or operation to be performed)
  - (c) Construction equipment
  - (d) Worker's Compensation, Automobile and Public Liability Insurance, Builders Risk
  - (e) Overhead-Subcontractor only
  - (f) Profit-Subcontractor only
3. The Developer's and Contractor's overhead, profit and commission will be included in a modification to the component of the Fixed Fees for Development and Construction Support Services, if required. The subcontractors' overhead and profit percentage included in the proposal will be considered to include, but not be limited to, insurance other than mentioned in b.2. of this clause, use of small tools, incidental job burdens, and general office expense. The percentages for overhead, profit and commission will be negotiated and may vary according to the nature, extent, and complexity of the work involved. Not more than two percentages for subcontractors work, not to exceed fifteen (15) percent each, will be allowed regardless of the number of tiers of subcontractors; that is, the markup on work subcontracted by a subcontractor will be limited to one overhead percentage and one profit percentage. On proposals covering both increases and decreases of the Scope of Work, the overhead and profit will be computed on the net change only.
4. The Developer must submit with its proposal its request for time extension (if any).
5. In considering a modification to the GMP, the Owner may check estimates in detail, utilizing unit prices where specified or agreed upon, with a view to arriving at an equitable adjustment.
6. Where modification is made to the GMP, appropriate adjustment will be made to the Fixed Fees for Development and Construction Support Services. This adjustment should include the Developer's profit and overhead costs only for work which:
- (a) Requires a duplication of work already included under the fee that has already been accomplished;
  - (b) Causes an appreciable increase in direct labor, material or other costs included under the fee; or
  - (c) Requires new labor, material or other direct costs of work not included under the fee.
- The Developer's and Prime Contractor's percentage of profit and overhead costs will be negotiated and may vary according to the nature, extent, and complexity of the work, but will not exceed ten (10) percent for the Developer and ten (10) percent for the Prime Contractor in total.
7. Payment for a Change involving construction work will be made on the basis of direct construction costs and subcontractor costs that are Reimbursable Costs, up to the limit of the revised GMP. Payment for Developer and Contractor services will be made on the basis of the negotiated fee.
8. After receipt of a proposal with a detailed breakdown, the Owner's Representative will act reasonably promptly thereon. However, when the necessity to proceed with a Change does not allow sufficient time to check a proposal, or in the event of a failure to reach an agreement on a revised GMP, the Developer, if directed by Owner, shall proceed with the work and will be reimbursed for all direct costs. The GMP shall be subsequently modified based on the actual cost of the change, plus a fee increase for overhead and profit as provided in this Article XVII.
9. Upon written request by the Owner's Representative, the Developer shall submit a proposal, in

accordance with the requirements and limitations set forth in subparagraphs (b.1) through (b.9) of this clause, for work involving contemplated changes covered by the request, within the time limit indicated in the request or any extension of such time limit as may be subsequently granted. If, within a reasonable time after receipt of such proposal, the Owner's Representative orders the Developer to proceed with the performance of the work proposed, the proposal submitted prior to the order will constitute the Developer's statement of the monetary extent of its claim for adjustment to the Guaranteed Maximum Price.

#### **17.4 Resolution of Disputes, claims and other matters**

Disputes, claims and other matters in question between the parties shall only be resolved as follows:

- a. The Developer shall give Owner written notice of any claim for any additional compensation, damages, or delay within Twenty-one (21) days of the beginning of the occurrence of the event leading to the claim being made, or within twenty-one (21) days of when Developer or any of its subcontractors first knew or first reasonably should have known of the occurrence of the event leading to the claim being made, and Developer shall submit the actual claim and any supporting data reasonably available within thirty (30) days after the occurrence giving rise to the claim ends unless otherwise agreed in writing by the parties. The "occurrence" means the condition encountered in the field giving rise to the claim and not a later dispute about payment for that condition. Claims of delay will be resolved as they occur, and no claims of cumulative impacts or deferral of claimed delay will be allowed. Complete satisfaction of this Section 17.4.a is a condition precedent for Developer to pursue a claim arising under or relating to this Agreement, and failure by Developer to satisfy this subparagraph a as to written notice or, unless otherwise agreed in writing by the parties, to submit its claim and reasonably available data in accordance with this Section 17.4.a will waive any claim by Developer as to which such failure applies. Unless otherwise agreed by the parties, the Owner shall act on any claims within ninety (90) days of their receipt.
- b. If, after the expiration of the ninety (90) day period in Section 17.4.a, the dispute, claim or matter in question remains unresolved, then either party may institute a lawsuit in the Circuit Court of Montgomery County, or if the subject or amount in controversy is within its jurisdiction, the General District Court of Montgomery County.
- c. Nothing in Section 17.4.b shall prevent a party from seeking immediate temporary injunctive or other temporary equitable relief in Montgomery County Circuit Court if circumstances so warrant.
- e. In the event of any dispute, claim, or other matter in question arising, Developer shall continue its performance diligently during its pendency as if no dispute, claim or other matter in question had arisen. During the pendency of any dispute in connection with the payment of moneys, Developer shall be entitled to receive payments for non-disputed items.
- f. No claim by Developer shall be allowed if submitted after final payment.

### **ARTICLE XVIII**

#### **TERMINATIONS**

##### **18.1 Termination for Convenience.**

- a. Performance under this Agreement may be terminated by the Owner for convenience, for any reason, in whole or in part at any time. A termination may be effected by delivery to the Developer of a notice of termination specifying the extent of work terminated, and the effective date of the termination which shall be not less than (thirty [30] calendar days from the date of the termination.
- b. Upon receipt of a notice of termination, unless otherwise directed by the Owner's Representative, the Developer must take the following actions:

1. Stop work to the extent specified in the notice.
  2. Place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of the unterminated work.
  3. Terminate all orders and subcontracts to the extent that they relate to the work terminated.
  4. Settle all outstanding liabilities and claims arising out of the termination of orders and subcontracts.
  5. Transfer title to the Owner and deliver as directed by the Owner's Representative:
    - (a) Work in process, completed work, and other material produced as a part of or acquired for the work terminated; and
    - (b) The completed or partially completed (in both hard copy and electronic format) plans, drawings, information, and other property that, if the Agreement had been completed, would have been furnished to the Owner.
  6. Complete performance of the work not terminated.
  7. Take any action that may be necessary, or that the Owner's Representative may direct, for protecting and preserving any property related to this Agreement that is in the possession of the Developer and in which the Owner has or may acquire an interest.
- c. At any time, the Developer may submit to the Owner's Representative a list, certified as to quantity and quality, of termination inventory not previously disposed of, and may request the Owner to remove inventory items or enter into a storage agreement covering them. Not later than fifteen (15) calendar days after receiving this request, the Owner will accept title to the items and remove them or enter into a storage agreement. The list will be subject to verification by the Owner's Representative upon removal of the items or, if the items are stored, within forty five (45) days after submission of the list.
- d. After termination, the Developer must submit to the Owner's Representative a termination claim in the form and with the certification prescribed by the Owner's Representative. The claim must be submitted promptly, but in no event more than one (1) year after the effective date of termination, unless an extension in writing is granted by the Owner's Representative. However, if the Owner's Representative determines that the facts justify such action, any termination claim may be received and acted upon at any time after the one (1) year period. Upon failure of the Developer to submit a termination claim within the time allowed, the Owner's Representative may determine, on the basis of the information available, the amount, if any, due the Developer by reason of the termination and will pay that amount.
- e. If the Developer and the Owner's Representative fail to agree on the amount to be paid to the Developer by reason of the termination, the Owner will pay the Developer the total of:
1. The amount payable per the Draw Schedule for Fixed Fees and the Schedule of Values for Reimbursable Costs based on the progress obtained on the Project at the time of the termination.;
  2. The cost of settling and paying claims arising out of the termination of work under subcontracts.
- f. The total sum to be paid to the Developer may not exceed the total Agreement price as reduced by the payments made and as further reduced by the Agreement price of work not terminated. Except for normal spoilage, and except to the extent that the Owner expressly assumed the risk of loss, there will be excluded from the amounts payable to the Developer under paragraph e above, the fair value, as reasonably determined by the Owner's Representative, of property destroyed, lost, stolen, or damaged so as to become undeliverable to the Owner, or to a buyer.
- g. The Developer has the right of review under the "Claims and Disputes" clause of any determination made by the Owner's Representative under paragraph d or e above, except that, if the Developer has failed to submit its termination claim within the time provided in paragraph d above and has failed to

request an extension of time, there may be no right of review.

- h. In arriving at the amount due the Developer, there must be deducted:
  - 1. Any valid claim that the Owner may have against the Developer under this Agreement; and
  - 2. The agreed price for or the proceeds of sale of materials, supplies, or other things kept by the Developer or sold and not recovered by or credited to the Owner.
- i. If the termination is partial, the Developer must file with the Owner's Representative a request in writing for an equitable adjustment of the price specified in the Agreement relating to the continued portion of the Agreement.

## **18.2 Termination for Default.**

- a. The Owner may, subject to paragraph d below, by written notice of default to the Developer, terminate this Agreement in whole or in part if the Developer fails to:
  - 1. Complete the requirements of this Agreement within the time specified in the Agreement or any extension;
  - 2. Make progress, so as to endanger performance of this Agreement; or
  - 3. Perform any of the other material provisions of this Agreement (but see subparagraph b following).
- b. Owner may terminate this Agreement under paragraph a.2 and a.3 if the Developer does not commence to cure the failure within ten (10) calendar days (or more if authorized in writing by the Owner's Representative) after receipt of the notice from the Owner's Representative specifying the failure.
- c. Owner may terminate this Agreement without notice or opportunity to cure if Developer declares bankruptcy or is involuntarily placed into bankruptcy.
- d. If the Owner terminates this Agreement in whole or in part, it may acquire similar supplies or services or complete the work, and the Developer will be liable to the Owner for any excess costs. However, the Developer must continue the work not terminated.
- e. Except for defaults of subcontractors at any tier, the Developer is not liable for any excess costs if the failure to perform the Agreement arises from causes beyond the control and without the fault or negligence of the Developer.
- f. If this Agreement is terminated for default, the Owner may require the Developer to transfer title and deliver to the Owner, as directed by the Owner's Representative, any completed supplies, partially completed supplies, and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights that the Developer has specifically produced or acquired for the terminated portion of this Agreement. Upon direction of the Owner's Representative, the Developer must also protect and preserve property in its possession in which the Owner has an interest.
- g. The Owner will pay the Agreement price for completed items delivered and accepted. The Developer and Owner's Representative may agree on the amount of payment for items delivered and accepted under paragraph e above for the protection and preservation of the property. Failure to agree will be a dispute under Section 17.4 of this Agreement. The Owner may withhold from these amounts any sum the Owner's Representative determines to be necessary to protect the Owner against loss because of outstanding claims.
- h. If, after termination, it is determined that the Developer was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for convenience.
- i. The rights and remedies of the Owner under this Section 18.2 are in addition to any other rights and

remedies provided by law or under this Agreement.

### **18.3 Termination for Owner Default.**

- a. The Developer may terminate the contract for default if, through no act or fault of the Developer or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the work under direct or indirect contract with the Developer, the Owner has not issued a certificate for payment and has not notified the Developer of the reason for withholding the certificate for payment within thirty (30) calendar days of receipt of a valid invoice, or because the Owner has not made payment within thirty (30) calendar days after the time stated in the Agreement for payment.
- b. The Developer may terminate the Agreement for default if, through no fault of the Developer, Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the work under direct or indirect contract with the Developer or Contractor, repeated suspensions, delays or interruptions of the entire work by the Owner, other than resulting from a termination for convenience or termination of Developer for default, as described in the contract, constitute in the aggregate more than ninety (90) calendar days in any three hundred sixty five (365) calendar day period.

## **ARTICLE XIX**

### **INSPECTION AND ACCEPTANCE**

#### **19.1 Inspection and Acceptance.**

- a. Owner inspection and testing of materials and workmanship will be made at reasonable times at the site of the work or off the site as the Owner's Representative may direct. Off-site inspection or testing does not relieve the Developer of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Owner after acceptance of the completed work under the terms of paragraph f of this section.
- b. The Developer must, without charge, replace any material or correct any workmanship found by the Owner not to conform to the contract requirements, unless the Owner consents to accept such material or workmanship with an appropriate adjustment in contract price. The Developer must promptly segregate and remove rejected material from the premises.
- c. If the Developer does not promptly replace rejected material or correct rejected workmanship, the Owner may, by contract or otherwise, replace or correct it and charge the cost to the Developer.
- d. The Owner may examine completed work by removing or tearing it out. The Developer must replace or correct any work found not to conform to contract requirements. If work is torn out and found to comply with contract requirements, the Owner's Representative must make an equitable adjustment for the services provided for the inspection and replacement of the work.
- e. The Owner will inspect the work as soon as practicable after completion.
- f. The Owner may terminate this contract for default and seek any remedy allowed by law if the Developer does not maintain an acceptable inspection system or follow Owner directions to replace or correct incorrect or defective items.

#### **19.2 Approval of Design.**

- a. The Owner's Representative must approve final plans and specifications. However, phased or fast track construction may commence prior to approval of final plans and specifications, provided the Owner's Representative has approved plans and specifications covering only that phase of the work. The Owner's Representative's review will be primarily for general arrangement and compliance with Owner requirements included as part of the contract.

Owner's Representative's approval shall not be construed as:

1. Permitting any departure from the contract requirements, without specific prior written approval.
  2. Relieving the Developer of responsibility for any errors including, but not limited to, details, dimensions and materials;
  3. Relieving the Developer of responsibility for compliance with applicable codes of local, state, or federal codes or regulations
- b. After approval of plans and specifications, the Developer shall be responsible for revising plans and specifications to correct deficiencies. Copies of revised plans and specifications will be furnished to the Owner's Representative. There will be no modification to any fee or to the GMP to the contract, as a result of such deficiencies.

### **19.3 Project Closeout.**

Unless specified for an earlier date elsewhere in this contract, the Developer must process all documents, changes, claim submissions, complete all Project closeout items, and submit a final report certifying that this action has been taken not later than six (6) months after the date of Substantial Completion.

### **19.4 Asbestos Free and Lead-Based Paint Free Certification.**

The Developer must certify that no asbestos-containing building materials or lead-based paints (interior or exterior) were used in this Project. The Developer must include completed and unaltered asbestos free and lead-based paint certifications as a closeout submittal document. The only acceptable alternative for asbestos certification is to conduct a post-construction asbestos survey in accordance with AHERA requirements.

## **ARTICLE XX**

### **MISCELLANEOUS**

### **20.1 Representations and warranties of authority.**

- a. Developer represents and warrants that it has legal authority to enter into this Agreement and perform all of its obligations herein, that all Work under this Agreement shall be performed by appropriately licensed entities or individuals when required, and that the execution of this Agreement by it has been duly and properly authorized. As a condition to this Agreement's effectiveness, Developer shall provide to Owner a certificate in form and with attachments satisfactory to Owner showing to Owner's satisfaction Developer's legal existence and authority to enter into this Agreement.
- b. Owner represents and warrants that it has legal authority to enter into this Agreement and perform all its obligations herein and that the execution of this Agreement by it has been duly and properly authorized, including approval by the local governing body in accordance with Va. Code § 56--575.16 (as evidenced by the signature of approval on behalf of Town of Blacksburg as Owner affixed to this Agreement).

### **20.2 Equal Opportunity Employment.**

- a. During the performance of this Agreement, the Developer agrees as follows:
  - (1) The Developer will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by federal or state law relating to discrimination in employment, except where there is a bona-fide occupational qualification reasonably necessary to the normal operation of the Developer. The Developer

agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

- (2) The Developer, in all solicitations or advertisements for employees placed by or on behalf of the Developer, will state that Developer is an equal opportunity employer.
  - (3) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the notice, advertisement, and solicitation requirements of this paragraph.
- b. The Developer will include the provisions of the foregoing paragraphs a(1), a(2), and a(3) (substituting the subcontractor or vendor for Developer as the obligated party) in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

### 20.3 Drug-Free Workplace.

- a. During the performance of this Agreement, the Developer agrees to (i) provide a drug-free workplace for the Developer's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the Developer's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the Developer that the Developer maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses (substituting the subcontractor or vendor for the Developer as the obligated party) in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.
- b. For the purposes of this paragraph, "*drug-free workplace*" means a site for the performance of work done in connection with this Agreement by Developer where its employees are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the Agreement.

### 20.4 Notices.

- a. All notices and demands by any party to any other shall be given in writing and sent by a nationally-recognized, overnight courier or by United States certified mail, postage prepaid, return receipt requested, and addressed as follows:

To the Owner:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_  
Telefax: \_\_\_\_\_

With a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_  
Telefax: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_

Telefax: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone: \_\_\_\_\_

Telefax: \_\_\_\_\_

To Developer:

C.J. "Skip" Smith, III  
W. M. J. Development, LLC  
11010 Jefferson Avenue  
Newport News, VA 23601

With a copy to:

Lindsey Carney, Esq  
Patten, Wornom, Hatten & Diamonstein, L.C.  
12350 Jefferson Avenue, Suite 300  
Newport News, VA 23602

- b. Any party may, upon prior notice to the others, specify a different address for the giving of notice. Notices shall be effective one day after sending if sent by overnight courier or three (3) days after sending if sent by certified mail, return receipt requested.

#### **20.5 Successors and assigns.**

Except as expressly otherwise provided, all of the terms, covenants and conditions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. This Agreement may not be assigned without the prior written consent of the parties to this Agreement. Notwithstanding the foregoing, if financing is obtained for the Project, the Owner may assign this Agreement to a third-party, as needed, to acquire a leasehold interest in the sites and to own the Project improvements. This Agreement may also be assigned to a mortgagee(s)/trustee(s) of deed(s) of trust of the fee or leasehold interest in the sites or portions of them. The Developer hereby consents to collateral assignment of this Agreement in favor of such mortgagee(s)/trustee(s) of deed(s) of trust, in a form reasonably satisfactory to such mortgagee(s)/trustee(s).

#### **20.6 No Waiver.**

The failure of Owner to insist upon the strict performance of any provisions of this Agreement, the failure of Owner to exercise any right, option or remedy hereby reserved, or the existence of any course of performance hereunder shall not be construed as a waiver of any provision hereof or of any such right,

option or remedy or as a waiver for the future of any such provision, right, option or remedy or as a waiver of a subsequent breach thereof. The consent or approval by Owner of any act by Developer requiring Owner's consent or approval shall not be construed to waive or render unnecessary the requirement for Owner's consent or approval of any subsequent similar act by Developer. No provision of this Agreement shall be deemed to have been waived unless such waiver shall be in writing signed by the party to be charged.

#### **20.7 Severability.**

If any term or provision of this Agreement shall be determined to be invalid or unenforceable in any respect, it shall be replaced with a substantially similar provision to the greatest extent possible and the Agreement shall remain in full force and effect.

#### **20.8 Counterparts.**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of such counterparts together shall be deemed to be one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for the other counterpart.

#### **20.9 Entire Agreement.**

This Agreement and the exhibits attached hereto and forming a part hereof set forth all the covenants, promises, agreements, conditions and understandings between Developer and Owner concerning the Project, and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth. No alteration, amendment, change or addition to this Agreement shall be binding upon Developer or Owner unless reduced to writing and signed by each party.

#### **20.10 Waiver of Claims for Consequential Damages**

Except as otherwise specifically provided, Owner and Developer waive claims against the other for consequential damages arising out of or relating to this Agreement. Nothing contained in this paragraph shall be deemed to preclude an award of liquidated damages when applicable in accordance with this Agreement.

#### **20.11 Governing Law.**

This Agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Virginia. Venue for any litigation arising from this Agreement shall be proper in the Circuit Court for Montgomery County, Virginia, and all parties to this Agreement voluntarily submit to the jurisdiction and venue of such courts, regardless of the actual location of such parties. The provisions of this Agreement shall not be construed in favor of or against either party but shall be construed according to their fair meaning as if both parties jointly prepared this Agreement.

#### **20.12 Annual Appropriation and Plan of Finance.**

The financial obligations of the Owner contained in this Agreement are subject to annual appropriation. Developer shall cooperate in executing any documents reasonably necessary to aid Owner in implementing its plan of finance for the Project.

**20.13 Financial Statements.**

Developer agrees to provide Owner with copies of its complete and current financial statements on an annual basis, or more frequently if reasonably requested by Owner. The Developer may designate such financial statements as confidential proprietary information exempt from release under the Virginia Freedom of Information Act by following the procedure for such designation indicated in the Owner's PPEA implementation procedures.

**20.14 Copy of agreement to auditor of public accounts.**

Owner shall submit a copy of this Agreement to the Virginia Auditor of Public Accounts within thirty (30) days of its effective date.

**20.15 APPROVAL BY TOWN OF BLACKSBURG A CONDITION PRECEDENT TO AGREEMENT'S EFFECTIVENESS.**

It shall be a condition precedent to this Agreement's effectiveness that it first be approved by Town of Blacksburg.

**20.16 CERTIFICATIONS.**

Intentionally Deleted.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly authorized representatives as of the date first above written.

DEVELOPER:

W. M. Jordan Development, LLC,  
a Virginia limited liability company

By: \_\_\_\_\_  
C.J. "Skip" Smith, III, Vice President, Development

Commonwealth of Virginia,  
CITY of Newport News, to-wit:

The foregoing Comprehensive Agreement was acknowledged before me this \_\_\_\_ day of July, 2020, by C. J. "Skip" Smith, III, as Vice President, Development, for and on behalf of W. M. Jordan Development, LLC, a Virginia limited liability company.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

OWNER:

TOWN OF BLACKSBURG, VIRGINIA,  
a Virginia municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Commonwealth of Virginia,  
City/County of \_\_\_\_\_, to-wit:

I, \_\_\_\_\_, a Notary Public in and for the jurisdiction aforesaid, certify that the foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2020, by \_\_\_\_\_ as the \_\_\_\_\_ for and on behalf of Town of Blacksburg, Virginia, an incorporated municipality of the Commonwealth of Virginia, acting for and on behalf of the said municipality.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

Notary registration number: \_\_\_\_\_

[Notary Seal]

Approved as to form and legal sufficiency:

\_\_\_\_\_  
By: Town Attorney



**EXHIBIT A**

**LAND DESCRIPTION**

All that certain lot, piece or parcel of land lying, being and situate in Montgomery County, Virginia, consisting of 1.571 acres, more or less, identified as "REVISED PARCEL A 1.571 ACRES" on Sheet 2 of that certain plat entitled, "LOT LINE ADJUSTMENT PLAT OF MIDTOWN – PHASE I SHOWING PARCELS A THROUGH E SITUATED ON CLAY STREET, S.E.; EHEART STREET, S.E.; AND SOUTH MAIN STREET BEING TAX NUMBERS 257-A-94, 257-A-94A; 257-25-C; 257-A-217 ; AND 257-A-218 TOWN OF BLACKSBURG MT TABOR MAGISTERIAL DISTRICT MONTGOMERY COUNTY, VIRGINIA" made by Balzer & Associates, Planners, Architects, Engineers, Surveyors, dated October 15, 2019, and revised January 31, 2020, which plat is recorded in the Clerk's Office of the Circuit Court for Montgomery County, as Instrument Number \_\_\_\_\_, on \_\_\_\_\_, 2020, a copy of which is attached hereto for a more particular reference.



**Project : Blacksburg Police Station**
**Todays Date: 8/26/20**
**Final**

	Total		Garage		Police station	
<b>Building Construction Costs</b>	\$	20,926,608	\$	8,192,311	\$	12,734,297
Construction Costs Total	\$	20,926,608	\$	8,192,311	\$	12,734,297
<b>Allowances</b>	\$	810,010	\$	65,000	\$	745,010
Fire alarm allowance		w/construction				
CCTV allowance		w/construction				
Access control allowance		w/construction				
Security allowance		w/construction				
Data and phone allowance	\$	130,000		\$		130,000
FF&E allowance **	\$	560,010		\$		560,010
Remove and replace bad soil	\$	60,000	\$	30,000	\$	30,000
Site furniture allowance	\$	10,000		\$		10,000
Exterior building signage	\$	15,000		\$		15,000
Electric charging stations	\$	35,000	\$	35,000		
<b>TOB/WMJD Contingency</b>	\$	615,479	\$	215,418	\$	400,061
<b>Soft Costs</b>	\$	2,882,552	\$	1,008,893	\$	1,873,659
Architect	\$	1,489,902	\$	521,466	\$	968,436
Engineer	\$	98,098	\$	34,334	\$	63,764
Consultants	\$	170,022	\$	59,508	\$	110,514
Testing & Inspections	\$	110,633	\$	38,722	\$	71,911
Permits, Impact & Tap Fees	\$	94,483	\$	33,069	\$	61,414
Permanent Utility Costs	\$	85,000	\$	29,750	\$	55,250
Developer Fee	\$	732,007	\$	256,202	\$	475,805
Soft Cost Contingency	\$	102,407	\$	35,842	\$	66,565
<b>Total WMJD Cost *</b>	\$	25,234,649	\$	9,481,622	\$	15,753,027
<b>Town of Blacksburg Costs</b>	\$	469,804	\$	50,000	\$	419,804
New computer equipment allowance	\$	30,000		\$		30,000
Fusion Desk allowance	\$	2,500		\$		2,500
Moving costs	\$	10,000		\$		10,000
Relocate existing phone system	\$	5,000		\$		5,000
Relocate Power Lines	\$	100,000	\$	50,000	\$	50,000
Server room equipment	\$	30,000		\$		30,000
Dedication Plaque	\$	1,500		\$		1,500
Audio visual equipment allowance	\$	80,000		\$		80,000
Storm facility share cost	\$	110,804		\$		110,804
Radio system	\$	100,000		\$		100,000
<b>TOB Contingency</b>	\$	645,547	\$	268,378	\$	377,169
<b>Total Town of Blacksburg Cost</b>	\$	1,115,351	\$	318,378	\$	796,973
<b>Total TOB Project Cost</b>	\$	26,350,000	\$	9,800,000	\$	16,550,000

CIP Funds \$ 9,800,000 \$ 16,550,000

Over/(Under) Budget \$ (0) \$ 0

\* Includes \$511,409 in value engineering

\*\* FF&E does not include: Patio Furniture, Community Room Furniture, Fitness Room Equipment, and Motorcycle/Bike Space Equipment. These items are currently not included in the budget.

Construction cost breakdown

Revised 7/22/20	8,862,101	12,575,916	21,438,017
Ve	(156,363)	(31,777)	
		(32,761)	
	(7,122)	(7,122)	
		(172,464)	
	(52,246)	(8,251)	
		19,843	
		197,360	
		(7,591)	
	(13,174)	(13,174)	
	8,633,196	12,519,979	21,153,175

	Garage	Police station	Total	
Revised 8/19/20	8,738,515	12,699,502	21,438,017	
VE	2 -156,363			
	4	-31,777		
	9	-32,761		
	14 -7,122	-7,122	-14,244	
	15 -36,460	-54,688	-91,148	
	21 -52,246			
	22	-8,251		
	23 -181,273			
	25	-16,828		
	27	19,843		
	28	197,360		
	29	-7,591		
	30 (26,348)			
	31 (78,576)			
	33	-21,740		
	34	-1,650		
	35 (7,816)			
	8,192,311	12,734,297	20,926,608	
	-546,204	34,795	-511,409	511,409